## INTRODUCTION AND PROCEDURAL HISTORY

Sharon D. Stewart (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on October 24, 1996.

The Commission investigated the charge and found probable cause that Venture Lighting, Inc. (Respondent) engaged in unlawful discrimination in violation of Revised Code Section (R.C.) 4112.02(A).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint on October 9, 1997. The Complaint alleged that Respondent forced Complainant to take maternity leave because of her sex (pregnancy).

Respondent filed a timely Answer to the Complaint. Respondent admitted certain procedural allegations, but denied that it engaged in any unlawful discriminatory practices. Respondent also pled affirmative defenses.

Respondent filed a Motion for Summary Judgment on September 23, 1998. The Commission replied on September 28, 1998. The Hearing Examiner denied Respondent's Motion on October 5, 1998.

A public hearing was held on October 22-23, 1998 at the Lausche State Office Building in Cleveland, Ohio. On the first day of hearing, Respondent moved to submit the deposition of Dr. John Kuhnlein, a medical consultant for the company, "for purposes of preserving his testimony at trial." (Tr. 222) Respondent's counsel represented that Dr. Kuhnlein resided in Omaha, Nebraska at the time of the hearing. The Commission's counsel, who had the opportunity to cross-examine Dr. Kuhnlein, did not object to his deposition becoming part of the record.[1]

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[1] Due to inadvertence and distraction, the Hearing Examiner did not rule on Respondent's request to make Dr. Kuhnlein's deposition part of the record. The Hearing Examiner did agree to read the entire deposition before the second day of hearing to settle a dispute over whether Respondent's counsel could read certain portions of the deposition into the record. Dr. Kuhnlein's deposition is hereby admitted into evidence for the following reasons:

(1) In these proceedings, physicians' depositions are commonly used in lieu of testimony at hearing out of professional courtesy;

(2) The Commission had the opportunity to cross-examine Dr. Kuhnlein during his deposition;

(3) The Commission did not object to the request to make his deposition part of the record; and

(4) The deposition is probative and substantial evidence that should be considered in determining the facts and liability in this case.

The record consists of the previously described pleadings, a transcript of the hearing consisting of 371 pages, the deposition of Dr. Kuhnlein consisting of 60 pages, evidence admitted into evidence during the hearing, post-hearing briefs filed by the Commission on January 20, 1999 and by Respondent on March 3, 1999, and a reply brief filed by the Commission on March 15, 1999.

## FINDINGS OF FACT

The following findings of fact are based, in part, upon the Hearing Examiner's assessment of the credibility of the witnesses who testified before him in this matter. The Hearing Examiner has applied the tests of worthiness of belief used in current Ohio practice. For example, he considered each witness's appearance and demeanor while testifying. He considered whether a witness was evasive and whether his or her testimony appeared to consist of subjective opinion rather than factual recitation. He further considered the opportunity each witness had to observe and know the things discussed, each witness's strength of memory, frankness or lack of frankness, and the bias, prejudice, and interest of each witness. Finally, the Hearing Examiner considered the

extent to which each witness's testimony was supported or contradicted by reliable documentary evidence.

1. Complainant filed a sworn charge affidavit with the Commission on October 24, 1996.

2. The Commission determined on October 9, 1997 that it was probable that Respondent engaged in unlawful discrimination in violation of R.C. 4112.02(A).

3. The Commission attempted to resolve this matter by informal methods of conciliation. The Commission issued the Complaint after conciliation failed.

4. Respondent is a corporation and an employer of approximately 300 employees. Respondent manufactures metal halide lamps at its plant in Solon, Ohio.

5. Respondent's plant is divided into three departments: Arc Tube, Mounting, and Finishing. The Arc Tube Department has approximately 65

to 71 employees who work either first or second shift. On each shift, Respondent employs tubulators, welders, pinch operators, exhaust operators, final inspectors, utility operators/trainers and machine adjusters. Females comprise approximately 80% of the workforce in that department.

6. Respondent uses small quantities of mercury and radioactive materials, such as krypton, in its production of arc tubes.[2] Exhaust operators work directly with mercury at benches located on each production line. These benches have a mercury doser that allows the operator to place a small amount of mercury into each tube. Exhaust operators are also required to weigh mercury that falls into a cup while dosing. Normally, Respondent schedules 10 to 11 exhaust operators per shift; they complete about 130 arc tubes per hour.

7. Once dosed with mercury, the arc tubes are carried in aluminum pans to areas for final inspection every hour. At the end of each workday,

[2] Respondent uses elemental mercury in its production process. Elemental mercury, which is also known as metallic mercury, is less toxic than other forms of mercury. (Tr. 231, Kuhnlein Dep. 16) For example, organic or methyl mercury has been medically linked to birth defects as a teratogen. (*Id.*, Kuhnlein Dep. 17) Other common uses of elemental mercury include dental amalgams and electric switches. (R.Ex. K, Tr. 233)

they are loaded on a cart and transported to the sliding rack area for storage. This area stores over 200,000 arc tubes at any given time.

8. Respondent monitors mercury exposure at its plant in the "physical sense and through air vapors."[3] (Tr. 134-35) Chris Cole, the Director of Environmental Health & Safety for Respondent's parent company (Advanced Lighting Technologies), performs mercury testing for Respondent throughout its plant. Cole uses a "real-time" mercury analyzer that takes a "snapshot" of mercury levels on the surface and in the air at a particular moment. (Tr. 163) Cole also takes "eight hour time weighted" air samples to measure mercury levels. (Tr. 164) These tests indicated that although the mercury levels in the Arc Tube Department were below governmental and other safety limits in 1996, there were detectable levels of mercury vapors at that time. (Tr. 245)

9. Respondent attempts to accommodate employees with work restrictions, particularly those injured on-the-job. Respondent has allowed

[3] Humans are primarily exposed to elementary mercury through vapors. (Tr. 231) In the past, Respondent estimated that approximately 50 arc tubes were broken at the plant per week. Mercury evaporates at room temperature. Respondent maintains the Arc Tube Department at 68º to 72º Fahrenheit for production reasons.

females employees to work as exhaust operators and perform other jobs throughout their pregnancies.

10. Complainant is a female. Respondent hired her in March 1995 as a pinch operator. Respondent promoted Complainant to utility operator in October 1995. Complainant performed this job for several months before she requested to return to exhaust operator. Respondent granted this request in April 1996.

11. Complainant became pregnant in July 1996. Shortly thereafter, Complainant informed Larry Farmer, the Production Manager of the Arc Tube Department, about her pregnancy. During their conversation, Complainant expressed concern about working with radioactive materials. Farmer informed Complainant that he believed that her pregnancy would not prevent her from working as an exhaust operator. (Tr. 27) Complainant continued to work as an exhaust operator after the conversation.

12. In mid-August 1996, Complainant had her first prenatal appointment with a nurse practitioner employed by Kaiser Permanente

(Kaiser). Complainant subsequently provided Farmer with a return to work slip that restricted her from lifting, pushing, or pulling more than 20 pounds and no repetitive bending or twisting. (Comm.Ex. 11) Complainant continued to work as an exhaust operator while Respondent accommodated these work restrictions.

13. In early September 1996, Complainant's exhaust machine leaked mercury on four consecutive days. The leaking mercury landed on Complainant, her clothes, and the floor after splattering on a metal tray designed to catch mercury. Complainant became concerned about being exposed to mercury during her pregnancy.

14. On September 11, 1996, Complainant had her second prenatal appointment. Dr. Molly Kramer, an obstetrician with Kaiser, examined Complainant during this visit. Complainant informed Dr. Kramer about the mercury leaks the previous week and her exposure to mercury. Complainant inquired whether such exposure posed any risk to the fetus.

15. Dr. Kramer informed Complainant that mercury exposure could cause birth defects and advised her that "it would be best if she worked

away from mercury."[4] (Tr. 103) Toward this end, Dr. Kramer prepared a return to work slip for Complainant, which indicated that she "[s]hould not work with mercury or other radioactive materials." (Comm.Ex. 12)

16. Later that day, Complainant provided the return-to-work slip to Farmer at the beginning of her shift. Farmer was unclear about the meaning of the restriction. Farmer immediately took Complainant off her exhaust operator machine because working at an exhaust bench was "the most likely place for direct contact with mercury." (Tr. 284) Farmer placed Complainant on an automatic tubulator machine until he was able to clarify the restriction.

17. For approximately a month, Respondent attempted to clarify Complainant's latest work restriction while she continued to work as a tubulator. Farmer initially consulted with Doug Wagner, the Director of Human Resources, about the meaning of "[s]hould not work with mercury or other radioactive materials." Wagner was also unsure what those words meant. Wagner discussed the matter with Cole. Cole advised Wagner that

[4] Complainant underwent a blood test for mercury exposure at Kaiser. The results of the test were negative.

Respondent could not accommodate the work restriction if it meant no exposure to mercury because the plant had detectable levels of mercury vapors. Wagner and Farmer later met with Tom Grady, Respondent's President, about the confusion over the work restriction. Grady instructed Wagner to contact Dr. Kramer and Dr. John Kuhnlein, the company's medical consultant.

18. Wagner called Dr. Kuhnlein and informed him about the need to clarify Complainant's work restriction. Wagner asked Dr. Kuhnlein to contact Dr. Kramer about the matter. Wagner also asked Dr. Kuhnlein to inform Dr. Kramer about Complainant's work environment.

19. Dr. Kuhnlein attempted to reach Dr. Kramer by telephone without success. Dr. Kuhnlein then sent Dr. Kramer a letter, dated September 27, 1996.[5] (Comm.Ex. 15) The letter indicated that Complainant, as an exhaust operator, worked with "extremely small quantities" of elemental mercury and radioactive materials. The letter also indicated that Respondent had never received any reports of "adverse outcomes in

[5] The letter was sent to Dr. Kramer by facsimile and mailed to Complainant by mistake. It was directed to Dr. Kramer at Kaiser, but addressed to Complainant.

pregnant females" from working as an exhaust operator or similar jobs at its plant. Near the end of the letter, Dr. Kuhnlein advised Dr. Kramer that he would call her later to discuss the matter; he would answer any of her questions about the work environment; and Respondent would allow her to tour the plant at her convenience.

20. On October 9, 1996, Complainant had her second appointment with Dr. Kramer. Complainant brought the letter from Dr. Kuhnlein with her and gave it to Dr. Kramer. Dr. Kramer told Complainant that she already received the letter by facsimile. They discussed Complainant's work situation. (Comm.Ex. 19) Dr. Kramer prepared another return to work slip for Complainant. This slip indicated that Complainant should "[c]ontinue to work away from mercury for remainder of pregnancy."[6] (Comm.Ex. 14)

21. On October 10, 1996, Dr. Kuhnlein called Dr. Kramer and talked to her over the telephone. (R.Ex. G) They discussed the letter. Dr. Kuhnlein reiterated that Complainant worked with extremely low levels of mercury and radioactive materials. Dr. Kramer made several statements

[6] There is no evidence in the record that Complainant gave this slip to Farmer or any other managerial employee before Respondent placed her on medical leave.

during their conversation that led Dr. Kuhnlein to believe that Complainant's work restriction meant no exposure to mercury. Dr. Kramer told Dr. Kuhnlein that "low exposure is not no exposure." (Tr. 121-22, Kuhnlein Dep. 39, 41) Dr. Kramer also told Dr. Kuhnlein that "no exposure would be best." (Tr. 120, 129) As in the letter, Dr. Kuhnlein offered to arrange a tour of Respondent's plant for Dr. Kramer; she declined the offer.

22. Dr. Kuhnlein called Wagner after talking to Dr. Kramer. Dr. Kuhnlein informed Wagner about his conversation with Dr. Kramer. Dr. Kuhnlein advised Wagner that Dr. Kramer took the conservative position that Complainant's restriction meant no exposure to mercury. Wagner relayed this information to Farmer who indicated that they needed to talk to Grady.

23. Wagner and Farmer met with Grady. Wagner informed Grady that Complainant's work restriction meant no exposure to mercury. Grady decided that Respondent did not have any positions where the company could "guarantee" that Complainant had no exposure to mercury.[7] (Tr.

[7] In reaching this conclusion, Grady relied on conversations with Cole about the results of his mercury testing. Cole indicated that Respondent could not "guarantee" no exposure since his testing revealed detectable levels of mercury in the plant's air supply. (Tr. 252)

147) Grady instructed Wagner to offer Complainant a leave of absence under the Family Medical Leave Act (FMLA).

24. Complainant reported to work later that day. Approximately an hour into her shift, Complainant met with Farmer, Wagner, Cole, and Brian Eaton, her supervisor on second shift. Wagner reviewed the September 11, 1996 work restriction with Complainant. Wagner informed Complainant that Respondent contacted Dr. Kramer to clarify the meaning of this restriction, and she indicated that the work restriction meant no or "zero exposure to mercury." (Tr. 41, 289) Wagner advised Complainant that she had to take FMLA leave for the remainder of her pregnancy because Respondent was unable to accommodate this work restriction. Wagner provided Complainant the paperwork for such leave and asked her to return it in 14 days. Wagner told Complainant that she could return to work if Dr. Kramer changed or lifted her work restriction. Wagner also told Complainant to call him if she refused to take leave, and he "would look into the matter further." (Comm.Ex. 20)

25. Following the meeting, Complainant contacted Dr. Kramer's office and left her a message that her employer sought clarification of her

work restrictions. Dr. Kramer sent Respondent a one page letter by facsimile on October 17, 1996. (Comm.Ex. 13) Dr. Kramer wrote the following in the letter:

> Sharon Stewart is currently pregnant and getting her prenatal care at the Kaiser Beachwood facility.
>
> As I have previously written, and discussed with Dr. John Kuhnlein, occupational medicine specialist, I have requested that Sharon <u>not</u> work with mercury because of a concern re[garding] possible spillage. Since mercury is volatile and potentially teratogenic[,] this was our only concern regarding her work during her pregnancy.
>
> It is <u>not</u> my recommendation that she stop working altogether during pregnancy. It is also not my recommendation that she cannot work in areas with radioactive compounds. The compounds that were discussed with me previously were non-volatile, very low radioactivity compounds that I feel Ms. Stewart could work around as long as the usual customary precautions are utilized.

26. Wagner received Dr. Kramer's letter on October 18, 1996. Three days later, Complainant called Wagner and asked if he received Dr. Kramer's letter. Wagner told Complainant that he received the letter, but it had not "cleared up the issue of her working with mercury." (Comm.Ex. 20) Wagner informed Complainant that she might be able to return to work if she signed "some type of release" indicating that she was willing to work in contravention of her work restrictions, and Respondent would not be held liable if anything happened to her or her baby. (*Id*.; Tr. 351, 358-59)

27. Complainant contacted Dr. Kramer again after talking with Wagner. Complainant informed Dr. Kramer about Wagner's statement that the letter did not clear up her work restriction relating to mercury. Dr. Kramer told Complainant that she explained the work restriction as "plain" and "clear" as possible, and the company chose "to interpret it differently." (Tr. 95) At this point, Dr. Kramer referred Complainant to a social worker.

28. Complainant requested FMLA leave on October 31, 1996. (R.Ex N) Respondent granted this request. Complainant remained on leave throughout the remainder of the pregnancy.

29. Complainant gave birth on March 29, 1997. Complainant returned to work as an exhaust operator in June 1997. Two months later, Complainant and other employees were laid off in a reduction in force. (Comm.Ex. 9)

## CONCLUSIONS OF LAW AND DISCUSSION

All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties and the arguments made by them are in accordance with the findings, conclusions, and views stated herein, they have been accepted; to the extent they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues presented. To the extent that the testimony of various witnesses is not in accord with the findings therein, it is not credited.

1. The Commission alleged in the Complaint that Respondent forced Complainant to take maternity leave because of her sex (pregnancy).

2. This allegation, if proven, would constitute a violation of R.C. 4112.02, which provides, in pertinent part, that:

It shall be an unlawful discriminatory practice:

> (A) For any employer, because of the . . . sex, . . . of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

3. The term "because of sex" for the purposes of R.C. 4112.02(A) includes, but it is not limited to, discrimination based upon pregnancy, pregnancy-related illnesses, childbirth, or related medical conditions. R.C. 4112.01(B). This division further provides that:

> Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .

4. The Commission has the burden of proof in cases brought under R.C. Chapter 4112. The Commission must prove a violation of R.C. 4112.02(A) by a preponderance of reliable, probative, and substantial evidence. R.C. 4112.05(G).

5. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *Ohio Civ. Rights Comm*. *v. David Richard Ingram*, *D.C.*, *Inc.*

(1994), 69 Ohio St.3d 89. Federal case law is especially relevant in this case because R.C. 4112.01(B) reads "almost verbatim to the Pregnancy Discrimination Act" of 1978 (PDA). *Priest v. TFH-EB*, *Inc. dba Electra Bore*, *Inc.*, 1998 Ohio App. LEXIS 1384; *See* 42 U.S.C. § 2000e(k). Thus, reliable, probative, and substantial evidence means evidence sufficient to support a finding of unlawful discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), as amended by the PDA.

6. Under Title VII case law, the Commission is usually required to first establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. *McDonnell Douglas Co. v. Greene*, 411 U.S. 792, 5 FEP Cases 965 (1973). The proof required to establish a *prima facie* case may vary on a case-by-case basis. *Id.*, at 802, 5 FEP Cases at 969, n.13. The establishment of a *prima facie* case creates a rebuttable presumption of unlawful discrimination. *Texas Depart. of Community Affairs v. Burdine*, 450 U.S. 248, 25 FEP Cases 113 (1981).

## ***PRIMA FACIE* CASE**

7. In this case, the Commission may establish a *prima facie* case of sex discrimination by proving that:

(1) Complainant was pregnant;

(2) Complainant was qualified for her position;

(3) Respondent subjected Complainant to an adverse employment action; and

(4) Respondent treated a non-pregnant employee, similar to Complainant in ability or inability to work, more favorably than her.

*Ensley-Gaines v. Runyon*, 72 FEP Cases 602 (6th Cir. 1996).

8. It is undisputed that Complainant was pregnant and qualified for various positions at Respondent's plant, in addition to exhaust operator, during the relevant period. Respondent argues that the Commission failed to show that Complainant was subjected to an adverse employment action because she voluntarily executed leave of absence forms during her pregnancy. This argument is contrary to the evidence.

9. The evidence shows that Complainant sought to work throughout her pregnancy, but Respondent refused to allow Complainant to continue

working because of the work restriction that Dr. Kramer placed on her. (Comm.Ex. 20, Tr. 41) Respondent's refusal to allow Complainant to work under the circumstances constituted an adverse employment action.

10. Although the Commission satisfied three elements of a *prima facie* case, the Commission was unable to show that Respondent treated Complainant differently than non-pregnant employees who were similar to her in their ability or inability to work. Specifically, the Commission failed to present any evidence that non-pregnant employees had the same or similar work restrictions as those placed on Complainant, and Respondent allowed them to work despite such restrictions. Farmer, who has been a supervisor in all of Respondent's departments, and Wagner, former Director of Human Resources, testified that Complainant was the only employee who ever provided them with a work restriction regarding working with mercury.

11. The record is also void of any evidence that Respondent allowed any non-pregnant employees to work in contravention of their work restrictions. Grady, Respondent's President, testified he has never

intentionally disregarded employees' work restrictions to allow them to work.

> The PDA does not require an employer to overlook the work restrictions of pregnant women unless the employer overlooks the comparable work restrictions of other employees.
>
> *Deneen v. Northwest Airlines*, *Inc.*, 76 FEP Cases 397, (8th Cir. 1998).

12. The Commission argues Respondent treated Complainant differently by deviating from its customary manner of dealing with an employee's work restrictions. As examples, the Commission cites Wagner's involvement in the matter, and the decision to call Dr. Kramer. These examples are not persuasive.

13. The evidence shows that Respondent, if anything, followed standard procedures in attempting to accommodate Complainant's work restrictions. Any deviation stemmed from the need to clarify her restrictions.

14. Complainant testified that Farmer, the Production Manager of the Arc Tube Department, accommodated her initial pregnancy-related work restrictions by providing her a lower chair and removing certain lifting duties. While it is true that Farmer and other departmental managers

usually made decisions on accommodating work restrictions, Wagner testified that he became involved when the restrictions were "more complicated" or the manager felt unable to accommodate them. (Tr. 194) This is what happened with the September 11, 1996 work restriction. Farmer testified that he approached Wagner about the restriction because its meaning was unclear to him. Complainant corroborated this testimony. According to Complainant, Farmer told her upon receipt of the restriction that he needed to consult with others because he "didn't know what to do" with her.[8] (Tr. 37)

15. Grady testified that he only becomes involved in decisions regarding work restrictions when there is something "abnormal" or "unclear" that managers are uncomfortable handling within their discretion. (Tr. 318) Grady testified that Farmer and Wagner approached him because they were unclear about the meaning of the work restriction that Dr. Kramer

[8] The Commission attempts to portray Wagner as the bad actor in this case. The Commission contended that Wagner withdrew the accommodation provided by Farmer. It is obvious that Farmer had concerns about his ability to accommodate Complainant's mercury-related work restriction, and he did not believe that placing her in a tubulator position solved the problem. Farmer testified that he assigned Complainant to a tubulator position to avoid direct contact with mercury while he sought clarification of her restriction. If Farmer had never raised his concerns about the meaning of this restriction with Wagner, it is unlikely that Wagner would have ever become involved in the matter.

placed on Complainant. Grady testified that he instructed Wagner to call Dr. Kramer and Dr. Kuhnlein to clarify the work restriction because he was also unclear of its meaning. Wagner asked Dr. Kuhnlein to call Dr. Kramer to encourage the free flow of information from physician to physician.

16. The Commission is also critical of Wagner's proposal that Respondent might allow Complainant to work in contravention of her work restrictions if she signed a release of liability. The Commission notes that Wagner never required another employee with work restrictions or a disabled employee to provide a release of liability to return to work. Wagner testified that he raised this possibility "to assist Sharon in being able [to] come back to work given the fact that we had a return to work [slip] from her doctor that we could not comply with any longer." (Tr. 192) This proposal does not establish that Respondent treated comparable non-pregnant employees better than Complainant; it only suggests that Wagner proposed an option to her that perhaps others were not given.

## PRETEXT

17. Assuming for purposes of argument that the Commission established a *prima facie* case of sex discrimination, the burden of production shifted to Respondent to "articulate some legitimate, nondiscriminatory reason" for its actions.[9] *McDonnell Douglas*, *supra* at 802, 5 FEP Cases at 969. To meet this burden of production, Respondent must:

> . . . "clearly set forth, through the introduction of admissible evidence," reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment decision.
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> *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507, 62 FEP Cases 96, 103 (1993), *quoting Burdine*, *supra* at 254-55, 25 FEP Cases at 116.

18. Respondent met its burden of production with Grady's testimony and documentary evidence created by Wagner. Grady testified that he decided that Respondent was unable to accommodate Complainant's work restrictions and instructed Wagner to offer her FMLA leave. Specifically, Grady testified that he concluded that Respondent did not have any

[9] Although the burden of production shifts to Respondent at this point, the Commission retains the burden of persuasion throughout the proceedings. *Burdine*, *supra* at 254, 25 FEP Cases at 116.

positions where the company could "guarantee" that Complainant had no exposure to mercury. (Tr. 147) Wagner determined that Dr. Kramer's later attempt to clarify Complainant's work restrictions, i.e. her October 17, 1996 letter, did not clear up "the issue of her working with mercury." (Comm.Ex. 20)

19. Respondent having met its burden of production, the Commission must prove that Respondent intentionally discriminated against Complainant because her sex (pregnancy). *Hicks*, *supra* at 511, 62 FEP Cases at 100. The Commission must show by a preponderance of the evidence that Respondent's articulated reasons for its actions were not its true reasons, but were "a pretext for discrimination." *Id.*, at 515, 62 FEP Cases at 102, *quoting Burdine*, *supra* at 253, 25 FEP Cases at 115.

> [A] reason cannot be proved to be a "pretext for discrimination" unless it is shown *both* that the reason is false, *and* that discrimination is the real reason.
>
> *Hicks*, *supra* at 515, 62 FEP Cases at 102.

20. Thus, even if the Commission proves that Respondent's articulated reasons are false or incomplete, the Commission does not automatically succeed in meeting its burden of persuasion:

> That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the . . . [Commission's] proffered reason of . . . [sex] is correct. That remains a question for the factfinder to answer . . .
>
> *Id*., at 524, 62 FEP Cases at 106.

21. Although it is not enough to simply disbelieve Respondent's articulated reasons to infer intentional discrimination,

> [t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of a *prima facie* case, suffice to show intentional discrimination.[10]
>
> *Id.*, at 511, 62 FEP Cases at 100.

Ultimately, the factfinder must be convinced that Complainant was "the victim of intentional discrimination." *Id*., at 508, 62 FEP Cases at 99, *quoting Burdine*, *supra* at 256, 25 FEP Cases at 116.

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[10] Even though rejection of Respondent's articulated reasons is "enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination*." *Hicks*, *supra* at 511, 62 FEP Cases at 100, n.4.

22. The evidence in this case shows that Respondent, whose workforce consists of primarily female employees, has historically allowed them to work as exhaust operators and in other positions throughout their pregnancies. Further, practically all of Respondent's witnesses, some with considerable expertise in mercury and knowledge of Respondent's work environment, testified that they believed it was safe for Complainant to work during her pregnancy, even as an exhaust operator.[11] Given this history and management's belief that the work environment was safe for pregnant employees, a concern for fetal protection is not a plausible explanation for Respondent's actions toward Complainant in this case. It is more likely that Complainant's work restrictions distinguished her from the other female employees who worked for Respondent throughout their pregnancies.

23. Other evidence supports the conclusion that Respondent's actions were motivated by Complainant's work restrictions, not her pregnancy. Farmer allowed Complainant to work as an exhaust

[11] Farmer testified that he has allowed female employees to work as exhaust operators during their pregnancies. Farmer also testified that he believed that it was safe for pregnant employees to work as exhaust operators because his wife performed this job for another company during her pregnancy.

operator and accommodated her initial work restrictions after she informed him of her pregnancy. Farmer moved Complainant to a tubulator position and sought clarification of her work restrictions *after* he received the September 11, 1996 return-to-work slip, which indicated that she "should not work with mercury or other radioactive materials." (Comm.Ex. 12)

24. As previously discussed, the process of clarifying this work restriction began with Farmer who initially questioned its meaning. Farmer testified that when he first read the work restriction it was unclear to him. Complainant corroborated Farmer's testimony about his initial reaction to the restriction. Farmer further testified that he was aware that Respondent's testing indicated that there were detectable levels of mercury vapors throughout his department.

25. The Hearing Examiner credited Farmer's testimony about his initial reaction to the work restriction and knowledge about the results about Respondent's mercury testing. In crediting Farmer's testimony on these issues, the Hearing Examiner also considered that the plain language of the work restriction might be subject to different interpretations.

26. The Commission argues that the Hearing Examiner should credit Dr. Kramer's testimony over Respondent's witnesses who testified about the meaning of the work restriction. The Commission makes this argument despite Dr. Kramer's conflicting testimony on this issue, and her failure to clarify the meaning of the restriction even at the hearing. Dr. Kramer testified on direct examination that she never intended that Complainant not work during her pregnancy; her intent was to restrict Complainant from working on the machine where she experienced prior mercury leaks.[12]

27. On cross-examination, Dr. Kramer admitted that she told Dr. Kuhnlein that "no exposure to mercury is best" and "low exposure is not no exposure" or words to that effect. (Tr. 120-22, 129) Dr. Kramer also admitted that she took the most conservative approach in terms of Complainant's potential exposure to mercury in her work environment. Dr. Kramer testified that it was her recommendation that Complainant not work in a position "where she could have mercury exposure." (Tr. 122) Kramer further testified on that page:

[12] Dr. Kramer never informed Respondent that she only intended to restrict Complainant from working as an exhaust operator. In fact, Dr. Kramer was unaware that Complainant worked as an exhaust operator at the time she placed the restriction on her. Dr. Kramer and Complainant never discussed the duties of either an exhaust operator or a tubulator.

Q: So you would not recommend any position where there was the potential to [sic] mercury exposure at any given time, isn't that right?

A: That, I think, was my intent.

28. In light of Dr. Kramer's conflicting testimony at the hearing, the confusion that must have existed at the time is more understandable. Dr. Kramer's testimony also demonstrates that she made statements during her conversation with Dr. Kuhnlein that led him to believe that Complainant's work restrictions meant no exposure to mercury. Regardless of whether she intended such a result, Respondent reasonably relied on Dr. Kuhnlein's representation that Dr. Kramer took the most conservative approach of no potential exposure. Armed with this information, Grady's decision that Respondent was unable to accommodate the work restriction was reasonable since there were detectable levels of mercury vapors throughout the plant in 1996.

29. The Commission also argues that Wagner ignored Dr. Kramer's October 17, 1996 letter, and a revised work restriction that indicated that Complainant should "[c]ontinue to work away from mercury for the remainder of her pregnancy." (Comm.Exs. 13, 14) While the evidence

substantiated that Wagner received the October 17, 1996 letter, there is insufficient evidence to conclude that either Wagner or Farmer, for that matter, received the revised work restriction.[13] Both testified that they never received a revised work restriction for Complainant in October 1996.

30. Wagner testified that he considered Dr. Kramer's letter, but it did not clarify whether Complainant could have exposure to mercury. Unlike her statement about "radioactive compounds", Dr. Kramer did not clarify in the letter that she never recommended that Complainant "cannot work in areas" with mercury. (Comm.Ex. 13) Although the letter clearly states that Dr. Kramer did not intend for Complainant to "stop working altogether", it failed to correct Respondent's understanding that her work restrictions meant no exposure to mercury.[14] *Id.*

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[13] The revised work restriction is undated, but signed by Dr. Kramer. Complainant testified that she had no recollection of giving the revised work restriction to Farmer, but she assumed that she gave it to him after her October 9, 1996 visit with Dr. Kramer. Complainant testified that this assumption was based on her past practice of providing Farmer such documents on the same day that she visited the doctor.

[14] Complainant testified that she contacted Dr. Kramer's office after the October 10, 1996 meeting and left her a message that Respondent sought clarification of her work restrictions. Perhaps, if Complainant had talked to Dr. Kramer in person at that time and informed her that Respondent believed that her work restrictions meant no exposure to mercury, then Dr. Kramer would have specifically address that issue in the letter. In the end, Dr. Kramer refused to make any further efforts to rectify the situation.

31. Finally, the Commission argues that the only plausible explanation for Respondent's refusal to allow Complainant to work was fear of tort liability. Assuming this explanation is true, the evidence suggests that the liability that Respondent feared was allowing a pregnant female to work in contravention of her work restrictions. Even Complainant testified that the release that Wagner proposed dealt with releasing the company from any liability that flowed from injuries to herself or her child caused by working "against . . . [her] doctor's restrictions." (Tr. 41, 358)

## CONCLUSION

32. After a careful review of the entire record, the Hearing Examiner concludes that the Commission neither proved that Respondent treated Complainant less favorably than comparable non-pregnant employees nor provided sufficient evidence to conclude that Respondent's legitimate, nondiscriminatory reasons were a pretext for pregnancy discrimination. This is an unfortunate case where a pregnant female was willing and able to work throughout her pregnancy, but her obstetrician disabled her with work restrictions that were not only vague, but also overly protective. In admittedly taking the most conservative position, Dr. Kramer may have

relieved any anxiety that she had about Complainant's potential exposure to mercury. But, in the process, Dr. Kramer cost Complainant income at a time when, as Complainant testified, she needed the money.

## RECOMMENDATION

For all of the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint #8131.

TODD W. EVANS
HEARING EXAMINER

September 24, 1999