

**EQUAL OPPORTUNITIES COMMISSION  
CITY OF MADISON  
210 MARTIN LUTHER KING, JR. BOULEVARD  
MADISON, WISCONSIN**

Linda Schulz 714 Rosevale Drive Belleville, WI 53508  <p style="text-align:center">Complainant</p> <p style="text-align:center">vs.</p> Ultratec 450 Science Drive Madison, WI 53711  <p style="text-align:center">Respondent</p>	HEARING'S EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER  Case No. 21584
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A public hearing on the complaint in this matter was held before Commission Hearing Examiner Clifford E. Blackwell, III commencing on December 2, 1992 and continued on December 7, 1992 and again on January 20, 1993 in Room 312 of the Madison Municipal Building 215 Martin Luther King, Jr. Boulevard, Madison, Wisconsin. The Complainant, Linda J. Schulz, appeared in person and by her attorneys, Julian, Olson & Lasker, S.C. by David E. Lasker. The Respondent, Ultratec, Inc. appeared by its Vice-President for Manufacturing, John Kincaid, and by its attorneys Lee, Kilkelly, Paulson and Kabaker, S.C. by Jeffrey W. Younger. Based upon the record of these proceedings and the arguments of the parties, the Hearing Examiner makes his Recommended Findings of Fact, Conclusions of Law and Order as follows:

**FINDINGS OF FACT**

1. The Complainant at the time of Hearing was a married, White, 45 year old woman. She was 43 years of age at the time of her hire by the Respondent and was 44 years of age at the time of her termination.
2. The Complainant, while employed by the Respondent, became friends with Barbara Hardin, a co-worker who is Black or African American and who was 50 years of age at the time that she was hired by the Respondent.
3. The Respondent is a Wisconsin corporation with its principle place of business located at 450 Science Drive within the City of Madison. It owns a production facility including necessary support facilities located at the same address. The Respondent manufactures telecommunication devices for the deaf. It employs numerous persons in furtherance of its business or enterprise.
4. Prior to 1991, the Respondent had no manufacturing or production facility and operated out of a location other than the 450 Science Drive address. It purchased equipment from vendors that it re-sold. In 1991, the Respondent moved to the Science Drive location because it was going to begin manufacturing its own products. The Respondent did not begin operating its production line until some time in September or October of 1991. Until the Respondent brought its production line into operation, it was engaged in preparing the building for production.
5. John Kincaid is the Vice-President for manufacturing for the Respondent. At the time of Hearing, Kincaid had been employed by the Respondent for between two and three years. The move to manufacturing was made partially as a result of the advice and experience of Kincaid.

Prior to being employed by the Respondent, Kincaid had been employed for just short of ten years by the manufacturer from which the Respondent purchased its product line. Kincaid also had several years of managerial, training and manufacturing experience with the United States government and private employers.

6. In 1991, Kincaid was responsible for starting the manufacturing process at the Respondent. He employed Bill Riederer as his Production Supervisor. Riederer was already an employee of the Respondent when Kincaid was first employed by the Respondent. Kincaid had Riederer transferred to the production unit because Kincaid believed Riederer possessed valuable knowledge and skills that would be helpful in starting the production line as well as an ability to work with people.
7. The Complainant began her employment with the Respondent on May 28, 1991. She was interviewed by Cheryl Jensen, now Becker, and John Kincaid. The Respondent was hired to work in the stock room though she wished to move to production as soon as possible. At the time of her interviews, the Complainant did not make her wishes known to either Jensen or Kincaid.
8. Prior to being employed by the Respondent, the Complainant had worked for Nicolet Instruments for approximately seventeen and one-half years. During this employment, she worked approximately two years in the stock room and the remaining time as an electronics assembler. She voluntarily left her employment with Nicolet Instruments and remained home with her children for two or three years. The Complainant began her employment with Nicolet about two years after her graduation from high school. Subsequent to her leaving Nicolet, the Complainant worked for approximately two years for Becton-Dickenson injecting culture media for medical or scientific use. The Complainant was also employed by Kohl's Department store as a cashier and by Isthmus Scientific on a very part-time basis as an electronics assembler. These positions seem to have all been held prior to the Complainant's employment with the Respondent.
9. Though the Complainant voluntarily terminated her employment with Nicolet Instruments, she experienced disputes with other employees at Nicolet. These disputes seem to have been at least partially a result of moodiness on the part of the Complainant.
10. Once employed in the stock room, the Complainant almost immediately began to seek a transfer to the production unit even though there was no production under way. The Complainant told her co-worker Michelle of her desire within the first two or three days of her employment. After approximately ten days to two weeks, Jensen and Kincaid agreed to the transfer of the Complainant from the stock room but not until a replacement for her had been found. Kincaid believed that the Complainant's experience in electronics assembly with Nicolet Instruments would be helpful in production and he did not wish to lose that experience base. The Complainant was permitted to transfer to the production unit in the third or fourth week of June, 1991. The Complainant was replaced in the stock room by David Liautaud.
11. At the time that the Complainant wished to transfer to the production unit, she spoke with Kincaid. She indicated that one of her reasons for wishing the transfer was that she did not get along well with her supervisor, Cheryl Jensen. In describing Jensen, the Complainant referred to her as being a "bitch".
12. The Complainant believed that Jensen did not like her and found it very difficult to get along with Jensen. The Complainant asserted that Jensen would not answer questions posed by the Complainant and would mumble insults about the Complainant under her breath.
13. Jensen was extremely busy during the Complainant's employment attempting to establish a parts inventory and to stock other supplies that would be necessary in the production process. She often spent time away from the stock room attending meetings and working in other areas of the building. Jensen was not rude to the Complainant and did not use insulting language

about the Complainant in her presence or out of it. Jensen reasonably attempted to meet the needs of her employees.

14. At the time that the Complainant transferred to the production unit, there were only two other employees, Bill Riederer and Dorna Boore. Riederer was the supervisor. Boore, like the Complainant, had experience as an electronics assembler and Kincaid did not wish to lose Boore's experience. There were no other employees added to the production unit until Joann Mauss was hired on or about September 3, 1991.
15. The Complainant assisted with preparation of the production area, ran errands and assisted in the planning and running of the company picnic during the summer of 1991. In mid-July the Complainant was involved in a non-work related automobile accident. She missed several days of work. She was sent flowers by the company and was allowed to use a company vehicle for personal use until she obtained a new one of her own. These kindnesses are typical of those extended by the Respondent to its employees.
16. Despite the fact that the Complainant and Boore were the only production level employees during July and August, the Complainant was from time to time unable to get along with her co-worker. The Complainant would ignore Boore and would refuse to speak with her. She was counseled by Riederer to make a greater effort to get along with Boore and to stop making trouble. Riederer had to speak with the Complainant on more than one occasion about her conduct.
17. During September, 1991, the Respondent hired more employees to work in the production unit. These included Carmen Klukas and Barbara Hardin on or about September 16, Lori Dailey, now Kelly, on or about September 23 and Tina Byington on or about September 25. There were other employees added whose names and starting dates are not contained in the record. On October 14, 1991, the Respondent added to the work force by hiring Dawn Bailey and Kristin Anderson. By October 25, 1991, the production unit had approximately ten employees.
18. When a person was hired to work in the production unit they were given some time to learn the area and the job. They would attend classes to give them the knowledge and skill necessary to perform the job. From time to time they would be tested on various aspects of the job to judge their abilities. Some of the tests administered were ones for component recognition, awareness of electro-static discharge, and installation, including soldering of circuit boards. Employees would be judged on the accuracy and neatness of their work.
19. The production area was set up to encourage a team concept. There are several work stations established in the work area and one or two production lines could be accommodated. Employees could be assigned to any of several work stations where their jobs would be different. Customarily, an employee would report to the last work station assigned until Riederer would assign a new task. Some of the tasks taking place in the production area are wire tinning, circuit installation including soldering, packaging and inspection.
20. The Respondent strives for a no-error rate of production. This policy is stressed to the employees at group meetings and through hand-outs such as "Why 99.9% won't do." This policy reflects a concern for the importance of the device manufactured by the Respondent to the ultimate consumer.
21. As more employees were added to the production unit the level of stress and tension rose. This tension was partially attributable to the newness of the production line, the inexperience of some of the employees and to individuals whose conduct disrupted the work atmosphere. Primary among these employees was the Complainant.
22. On more than one occasion the Complainant referred to other workers as "bitch", "fucking bitch", "frigging bitch" or "fricking bitch". These incidents were witnessed by John Kincaid, Bill Riederer and Sean Widish.

23. The Complainant and other employees would stare or glare at each other. This conduct was observed by Kincaid and Riederer.
24. The Complainant would go through periods when she would not speak with her co-workers and would remain aloof from them. This conduct was observed by Riederer.
25. The Complainant engaged in gossip and belittling name calling about other employees. This conduct was observed by Dawn Bailey and was reported to Riederer.
26. Barbara Hardin learned of employment possibilities with the Respondent as a result of conversations with her friend, Marnice Dorsey. Dorsey, a Black woman, had been employed by the Respondent in the area of Customer Service from January of 1991. Dorsey knew that Hardin might have some difficulty with the work in the production unit but convinced Hardin to try the work and Kincaid to give Hardin a chance. Dorsey encouraged Hardin because she found the Respondent to be a good employer.
27. Hardin began her employment on or about September 16, 1991. She felt comfortable with her co-workers because they were friendly and would speak with her. After approximately one to two weeks on the job, Hardin met the Complainant. They began having lunch together and became good friends. Hardin noticed that shortly after associating with the Complainant that other coworkers would not be as friendly or would not speak with her. She believed that Riederer, her supervisor, also began to distance himself from her in that he would not answer her questions about work she was doing. She did not report these concerns to anyone with the Respondent.
28. The only instance reported by Hardin where Riederer refused to speak with her about work was a question that she had about a test that she was taking. Riederer could not provide her with information without ruining the validity of the test.
29. Hardin's co-workers uniformly liked Hardin but felt uncomfortable with the Complainant.
30. Hardin could not adequately perform the work required by her position as an electronics assembler. In early October of 1991, Hardin completely failed a component recognition exercise. In mid-October, she failed an important soldering test. On October 25, 1991, Kincaid called her to his office and fired her for her inability to do the job. She thanked Kincaid for giving her the opportunity to try the job and for giving her a second chance to perform the job.
31. At the same meeting as described above, Kincaid also fired the Complainant. He did not offer a reason for this decision at the time and the Complainant did not ask for the reason for her termination. Subsequent to the termination, the Respondent has indicated that the Complainant was fired because of her inability to properly perform the work, her inability to work with others and due to her use of profanity in the work place.
32. Approximately seven to ten days prior to her termination, the Complainant took the required soldering test. She failed to solder an important circuit though she properly placed the circuit on the circuit board. Other employees had similar or worse mistakes on their tests. Each employee, including the Complainant, had a brief meeting with Kincaid to discuss the results of their soldering test. At this meeting, Kincaid told the Complainant that he was shocked that a person with her level of experience would make a mistake like the one made by the Complainant. The Complainant said that she would try to be the best employee that she could be. Kincaid stated that he would have to consider what he would do about the test.
33. The Complainant had performance problems earlier than the soldering test. She would fail to identify errors in work that was part of her production line because she was looking around at other workers instead of concentrating on her work. As part of the team concept utilized by the Respondent, it was important for each employee on the production line to pay attention to the product as it passed so that errors could be detected and corrected on the line. Riederer had counseled the Complainant to pay closer attention to her work and not to look around at others.

34. Shortly after Tina Byington was employed by the Respondent, the Complainant, Hardin and Byington participated in a component recognition class. Hardin did extremely poorly in the class. After the class, another employee, Sabrina (last name unknown) approached the Complainant and Hardin. She stated that Tina had called Hardin a dummy and the Complainant a "bitch". The Complainant took this as a sign of racist attitudes on the part of Tina and reported the incident to Riederer. The Complainant explained her beliefs about the racist origin of the comments and asked Riederer to speak to Tina about the incident.
35. Riederer told both the Complainant and Hardin that they should not pass on negative comments to each other and that he would speak to Tina. Riederer spoke to Byington about the incident and told her not to make negative comments about other employees despite the fact that Byington denied the incident. Riederer also informed Kincaid of the Complainant's concerns.
36. Kincaid Spoke with Hardin about the situation and called a general meeting of the production unit. The meeting was held on the production floor. Kincaid told the assembled group that it was important for them to work together as a group and that gossip and negative comments would not be tolerated. Kincaid also emphasized that the Respondent was an equal opportunity employer and that discrimination in any form would not be tolerated and offenders would be disciplined. Subsequent to this meeting there were no further incidents of name calling regarding Hardin.
37. In early October of 1991, the Complainant and Hardin went to lunch at a local Lum's. During lunch the Complainant became very ill. By the time she and Hardin returned to work, she had vomited and was extremely weak. Debbie Gallagher saw Hardin and the Complainant returning to work as Gallagher was leaving. Gallagher assisted the Complainant into the building and obtained permission for the Complainant to leave and for Hardin to drive the Complainant home in a company car while remaining on the company's time. Gallagher cleared these arrangements with Riederer and Kincaid. While Gallagher was making these arrangements, the Complainant returned to her work station but was unable to work. Riederer asked the Complainant if she wished to leave because of her health. The Complainant stated that she needed to continue to work because she needed the money.
38. While at her work station, the Complainant heard laughter from some co-workers at a nearby work station and the word "drugs". She took this as an indication that those co-workers believed that she and Hardin had probably indulged in the use of illegal drugs at lunch because Hardin is Black. There were no specific racial statements made and no indication that the statement overheard by the Complainant was directed at the Complainant or her current circumstance.
39. Shannon Phillips was an employee of the Respondent from some time in January of 1991 until later that year. She was a repair technician from the beginning of her employment until some time in October of 1991. In October, 1991 she transferred to a position in the stock room. She voluntarily left the Respondent's employment to take a job closer to her home. During the first two or three months of the Complainant's employment, she and Phillips were friends and often went to lunch together. At some time before Hardin was hired by the Respondent, Phillips and the Complainant no longer went to lunch or were friendly with each other. Phillips stated that the Complainant no longer appeared to wish to associate with her.
40. At some unidentified time subsequent to Hardin's employment by the Respondent, Phillips asked the Complainant to go to lunch. The Complainant asked Hardin to go with them. By the time the Complainant notified Phillips that Hardin would be coming along, Phillips had changed her mind about going to lunch with the Complainant. There is no indication that Phillips changed her mind because of the presence of Hardin.
41. At an unidentified time after Hardin became employed by the Respondent, Phillips and an employee identified as Sabrina were sitting together at a table in the break room. The Complainant and Hardin came into the break room followed by Debbie Gallagher. Gallagher is

- an employee of the Respondent working in the area of customer service. As the Complainant entered the room Sabrina told her that Phillips had called her a "bitch". The Complainant did not instigate this incident. Phillips admits that she told Sabrina in sign language that the Complainant was being "bitchy" that day. Gallagher believed that she had heard the Complainant use the word "bitch" after which she saw Phillips sign the word for "bitch".
42. Gallagher told Phillips and Sabrina that such conduct was not appropriate in the work place and would not be tolerated by the Respondent. She asked the Complainant and Hardin to join her outside as a way to ease the situation. She told the Complainant and Hardin something similar to what she had told Phillips and Sabrina.
  43. Gallagher reported the incident to Kincaid within a few days of its occurrence. She told him that there was a tense and strained situation in the production unit that he needed to address.
  44. Shortly after Dawn Bailey began her employment with the Respondent, she was assigned to work with the Complainant. Prior to this occasion, Bailey felt that she got along well with the Complainant. After that date she did not feel that she was comfortable with the Complainant. On the occasion of her working with the Complainant, Bailey asked her if she regularly went to lunch with Barbara Hardin. The Complainant told Bailey that it was none of her business. A day or two after this incident, Bailey and Kristin Anderson were working across a table from the Complainant and Hardin. Bailey overheard the Complainant tell Hardin that it was like working with your own kids. This made Bailey feel that the Complainant believed her to be incompetent.
  45. Kincaid uniformly referred to the production unit as a "young" part of the company denoting the length of time that the production unit was in existence. He never referred to any policy to hire only young persons. On one occasion, the Complainant noted to Bailey and Anderson that Kincaid seemed to be hiring only young females. Because Bailey and Anderson were both young females recently hired by Kincaid, neither of them commented on the Complainant's observation.
  46. Several employees believe that the level of tension on the production floor markedly diminished shortly after the Complainant was fired. Employees such as Lori Kelly stated that the Complainant treated other employees as less important than herself and would often gossip, glare and stare at other employees instead of performing her job. The list of these employees includes but is not necessarily limited to: Carmen Klukas, Lori Kelly and Bill Riederer.

### **CONCLUSIONS OF LAW**

47. The Complainant is a member of the protected class "age" because at the time of her hire she was 43 years of age and at her termination was 44 years of age. She was significantly older than most other employees in the production unit.
48. The Complainant is a member of the protected class "race" by virtue of her association with Barbara Hardin, a Black woman.
49. The Respondent is an employer within the meaning of the Ordinance and is subject to the jurisdiction of the Commission.
50. The Complainant was not terminated from her employment by the Respondent on October 25, 1991 in violation of the Ordinance. Her firing was for legitimate, nondiscriminatory reasons consisting of her poor job performance, her inability to get along with her co-workers and her excessive use of profanity in the work place.
51. The Respondent did not illegally discriminate against the Complainant on either the basis of her age or her race by association.

### **ORDER**

The complaint is dismissed. Each party shall bear her or its own costs including attorney's fees.

### **MEMORANDUM DECISION**

Hearing in this matter was conducted pursuant to the issues set forth in the Notice of Hearing issued on July 10, 1992. This Notice was based upon the issues set forth in the original complaint filed on October 29, 1991, the Initial Determination and discussion with the parties at the Pre-Hearing Conference held on July 8, 1992. The issues for hearing were limited to "Did the Respondent discriminate against the Complainant on the basis of her age in terminating her employment?" and "Did the Respondent discriminate against the Complainant on the basis of her race by association with other persons in terminating her employment?" An additional issue relating to damages was indicated. At the hearing, the Complainant presented evidence to support both claims of liability on the basis of age and race by association.

In neither of the post-hearing briefs submitted by the Complainant, does the Complainant mention even once the claim of discrimination on the basis of age. The Respondent argues that this absence of discussion on the part of the Complainant should be taken as a withdrawal of that claim by the Complainant. Unfortunately, the Hearing Examiner disagrees with this contention. Since the issue of age discrimination was noticed for hearing and since some evidence relevant to this issue was adduced at hearing, the Hearing Examiner must make appropriate Findings of Fact and Conclusions of Law with respect to this issue absent a clear and unequivocal withdrawal of this issue by the Complainant. A mere lack of discussion does not represent such a clear and unequivocal withdrawal of this issue by the Complainant. It may represent a demonstration of either oversight or extreme confidence as well as a desire to withdraw this issue from consideration. Accordingly, the Hearing Examiner will address the issue of age discrimination without the aid of additional argument by the Complainant.

The record relating to the issue of age discrimination is relatively slim. The basis of the Complainant's claim seems to be that during her employment with the Respondent she was forty-three years old (44 years old at the time of termination), that the majority of the work force was substantially younger and that she and Barb Hardin, who was approximately 50 years old, were terminated from employment while younger persons were retained. In support of her claim of age discrimination, the Complainant stated that she was told by Dawn Bailey or Kristin Anderson that John Kincaid, the Respondent's Vice-President for manufacturing had said that the Respondent was a "young" company. Either Dawn or Kristin were then alleged to have observed that the Complainant and Barb (Hardin) were likely to be the first to be fired. This appears to be the entirety of the Complainant's claim of age discrimination.

The Respondent denies that it discriminated against the Complainant on the basis of her age in terminating her employment. Further, the Respondent denies that John Kincaid ever expressed that he wanted to keep a young work force and that he intended to get rid of the Complainant and Ms. Hardin first or at any time because of their ages. At all times, the Respondent has contended that it terminated the Complainant's employment because she did not meet the Respondent's quality standards for her work performance and because she was a disruptive influence in the work place that adversely affected the operation of the facility.

The Complainant was interviewed by John Kincaid when she first applied for employment with the Respondent. The interview was conducted face-to-face. At the time of the interview, Kincaid knew that subsequent to the Complainant's graduation from high school, she had been in the work force for at least twenty years. It was partially this reservoir of experience in areas related to the work of the

Respondent that influenced Kincaid to retain the Complainant and to allow her early transfer to the production unit. Generally speaking, it seems unlikely that if an employer is going to discriminate against an employee at a later date that it would bother to hire the employee in the first place. Subsequent to hiring the Complainant, the Respondent hired Barbara Hardin, a person who was older than the Complainant. Again, if the Respondent were going to discriminate against the Complainant because of her age, it is unlikely that it would knowingly hire an even older employee after having hired the Complainant.

Putting aside these actions of the Respondent for the moment, the Hearing Examiner turns to the evidence presented at hearing by the Complainant. The Complainant asserted that either Dawn Bailey or her friend, whose name the Complainant did not recall, told her and Barbara Hardin that John Kincaid wanted to keep the company young and that consequently the Complainant and Barbara Hardin would be the first to be fired. The Complainant produced no evidence to corroborate this statement. The Complainant testified that she thought this statement had been made in late September or early October. This recollection highlights a recurring problem with the testimony of the Complainant. She had an extremely faulty memory for general matters of some importance such as her employment history but professed to clearly remember perceived slights or wrongs done to her.

The Complainant's testimony with respect to this matter is highly suspect. Bailey and her friend, who was later identified as Kristin Anderson, were not hired until October 14, 1991. This means that if the incident occurred at all it could not have happened until almost the last week of the Complainant's employment. Casting further doubt on the Complainant's testimony is the testimony of Bailey. It was her testimony that it was the Complainant who raised the subject of age with her. Bailey recounted that on the one day on which she and the Complainant worked together directly, the Complainant observed that Kincaid seemed to be hiring only young females for the production unit. Since Bailey was only 18 or 19 years of age at the time and a new employee, she offered no response because she did not want to take sides. On the same day Bailey asked the Complainant if the Complainant and Barbara Hardin usually went to lunch together. Bailey was taken aback by the Complainant's angry response that it was none of her business. From that point on Bailey did not wish to associate with the Complainant. Prior to that occasion, she felt that she had no problems with the Complainant.

In an additional incident, Bailey stated that she and Anderson were working across a table from the Complainant and Hardin. Bailey testified that the Complainant told Hardin that it was like working with your kids. Bailey took this statement to apply to her and Anderson and as an indication of incompetence on their part.

As between the testimony of Bailey and the Complainant, Bailey's is more credible. It is consistent with the testimony of other witnesses concerning the attitude and nature of the Complainant. Kincaid testified that he always referred to the production unit as being a young endeavor because of its recent startup, not because of the age of its employees. Such a mischaracterization of someone else's words is consistent with the picture of the Complainant revealed by the testimony at hearing. The Complainant's testimony on this point suffers from a faulty account of when the incident allegedly occurred as well as a lack of supporting testimony. Hardin's testimony on this point did not indicate any clear or actual recollection of the incident.

Given these facts, the Complainant fails to demonstrate that she was terminated on October 25, 1991 because of her age. It does seem from the testimony that many of the employees hired in September and October of 1991 were substantially younger than the Complainant. However, this does not by itself lead to an inference of age discrimination. An equally possible explanation of this fact could be the level of wages offered by the Respondent. The starting wage was low enough that it may have



appealed only to someone starting right out of high school such as Bailey and Anderson. Since competing inferences may reasonably be drawn from the facts, the Hearing Examiner may not choose one inference over another. This portion of the Complainant's complaint fails for lack of proof.

The second part of the Complainant's complaint relates to her allegation that she was fired because she had befriended Barbara Hardin, a Black woman. Again, the Respondent denies the allegation stressing that the Complainant was terminated for legitimate, non-discriminatory reasons related to her performance of her work and her conduct at the work site.

The Respondent does not seem to contest the Commission's jurisdiction to hear a complaint based upon a claim of discrimination due to one's association with a person in a protected class even though the Complainant is not a member of the claimed protected class. It is clear that interpretations of Title VII support jurisdiction in such situations. Whitney v. Greater N.Y. Corp. of Seventh-Day Adv., 401 F. Supp. 1363, 1366 (S.D. N.Y. 1975); Gresham v. Waffle Hour, Inc., 486 F. Supp. 1442 (N.D. Ga. 1984); Holiday v. Belle's Restaurant, 409 F. Supp. 904 (W.D. Pa. 1976). This rule is also consistent with the EEOC's interpretation of federal discrimination law. Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986), and Reiter v. Center Consolidated School Dist., 618 F. Supp. 1458, 1460 (D.C. Colo. 1985).

The federal position was recognized by the Wisconsin Supreme Court in a Commission case that reached the high court on appeal. Federated Rural Electric Insurance Co. v. Kessler, 131 Wis. 2d 189, 209 (1986). Although a finding on that issue was not necessary to the resolution of Kessler, the Court recognized that it is widely accepted that an employee may not be punished as a result of his or her associations with another person who is a member of a protected class. The Complainant in Kessler sought a finding of discrimination on the basis of marital status, not directly on an associational theory.

In the case of Dischler v. Oscar J. Boldt Construction Company, MEOC Case 21545 (Examiner's Dec. July 5, 1994, appeal pending), the Hearing Examiner found that a person who was terminated because the employer wrongly believed that the Complainant had complained of sexual harassment of women by a supervisor, could file a complaint even though he was not the person who had asserted rights protected under the Ordinance. Though this situation is not identical to that posed in the current case, the Dischler decision demonstrates the broad reach of the Ordinance. Given the general rule of interpretation that requires a broad reading of a remedial statute such as the Equal Opportunities Ordinance, the Hearing Examiner finds that the Commission has jurisdiction over the allegations of this complaint.

The Complainant asserts that once she became friends with Barbara Hardin, an African American, her associations with other employees of the Respondent, including her supervisors, deteriorated to the point that she was fired as a result. It is not entirely clear from the Complainant's briefs whether she asserts a direct causal connection between her friendship with Hardin and her termination or a somewhat less direct connection stemming from poor performance caused by the alleged reaction of her co-workers to her friendship with Hardin. The Hearing Examiner's decision resolves both theories.

In general, the Complainant portrays herself as having been an ideal employee with the Respondent and any other employer with which she has been employed. The Complainant bases her perception on her belief that she is friendly, outgoing and possesses technical skills and experience above and beyond that of her co-workers. The Complainant's views include not only her employment with the Respondent but that at Nicolet Instruments as well as that subsequent to her termination by the Respondent. The Complainant produced no employment records or corroborative testimony about her

employment prior to that with the Respondent. She did produce witnesses whose testimony supported, to some extent, her testimony for the period subsequent to her termination.

Not surprisingly, the Respondent paints a different picture of the Complainant's value as an employee, particularly during the time of her employment with the Respondent. The Respondent produced minimal testimony to contradict the Complainant's description of her employment with Nicolet Instruments. The Respondent produced no contrary testimony about the Complainant's work performance subsequent to the Complainant's termination. However the Respondent contends that such testimony about the Complainant's post-termination work performance is essentially irrelevant because of the non-comparative nature of that employment.

When viewing the record as a whole, the Hearing Examiner concludes that the Complainant was a disruptive influence in the work place whose presence and demeanor adversely affected the productivity of the Respondent's manufacturing effort. The Hearing Examiner additionally finds that the Complainant's unquestionable skills as an electronics assembler were not being used to the Complainant's full capacity and that this underutilization caused further disruption in the production unit. It was primarily as a result of this chaos and lack of productivity that the Complainant was terminated. There is no real evidence in the record to support the Complainant's contention that her friendship with an African American caused her termination.

The Complainant's employment with the Respondent can best be seen as consisting of four periods. First would be the period of her work in the stock room. Second would be the period of time during which she and Dorna Boore were the only production unit employees. Third would represent the short period of time during which the Complainant was employed in the production unit as the unit was beginning to gear up for production but prior to the friendship of the Complainant and Hardin. The final period would be that time subsequent to the commencement of the friendship between the Complainant and Hardin up to their terminations.

During the time that the Complainant worked in the stock room her primary motivation seems to have been to get out of the stock room and into production. While it seems that the Complainant's supervisor in the stock room had no complaints about the Complainant's work or conduct, a similar attitude on the part of the Complainant was not displayed by the Complainant. In speaking to John Kincaid about transferring to the production unit, she indicated that she did not get along with Jensen and that she thought that Jensen was a "bitch". The Complainant, at the time of hearing, could not testify about any conduct or event that justifies this attitude on her part.

The Complainant's complaints against Jensen seem to be that Jensen would sometimes not answer questions posed by the Complainant. The Complainant also testified that she believed that Jensen would swear at her and speak badly about her to other employees in the stock room or as she passed by the Complainant. The Complainant could not recall any specific words or circumstances in which Jensen behaved as the Complainant asserted. The most that the Complainant could state is that she had no doubt that Jensen was talking about the Complainant under her breath. While the Complainant may have no doubts about this conduct that is insufficient for the Hearing Examiner. Jensen denied that she engaged in such conduct and the Complainant produced no corroborative testimony from any other witnesses. Given the Complainant's seeming propensity to see the world as being either for her or against her, the Hearing Examiner cannot give the Complainant the benefit of the doubt in this matter.

Further doubts are created by the testimony of Shannon Phillips. Phillips, at the time of hearing, no longer worked for the Respondent and owed it no particular loyalty. Phillips began her employment

with the Respondent as a technician in the service department. In October of 1991, she transferred to a position in the stock room. Phillips described some of the same conduct on the part of Jensen as that described by the Complainant. However, Phillips had a much less sinister explanation for she same conduct. Both Phillips and the Complainant indicated that Jensen would not always be present in the stock room when questions needed to be answered. While the Complainant saw this as Jensen ignoring her, Phillips recognized that Jensen was a busy person with duties that often took her to other parts of the building.

Phillips also observed that Jensen would sometimes not immediately answer a question posed to her. This is consistent with the testimony of the Complainant. Again, however, Phillips noted a more ordinary explanation for this conduct than offered by the Complainant. Phillips recognized that Jensen did not always have an immediate answer and needed to consult someone else for the desired information. At other times Jensen was involved in some other project from which she could not be distracted. Jensen also testified that she did not always have at her fingertips the answer to all questions from her employees. The record makes it clear though, that Jensen made a reasonable effort to answer all of her employees questions and did not intentionally snub the Complainant.

The Complainant and Phillips were parties to a somewhat mixed relationship. Both Phillips and the Complainant testified to the fact that they had once been friends and went to lunch together. This friendship came to an end at some not clearly identified time. The Complainant asserts that Phillips ended their friendship as a result of the Complainant's new friendship with Hardin. As evidence of this the Complainant relates an incident in which Phillips asked the Complainant to go to lunch. Subsequent to this invitation, the Complainant asked Hardin to come along with them. The Complainant contends that once Phillips found out that Hardin was to join them that she (Phillips) said she no longer wanted to go to lunch.

There was no testimony of any kind indicating that Phillips' decision was based upon Hardin's race or the fact that the Complainant, a White, was associating with an African American. Phillip had no recollection of the incident and specifically denied ever having refused to go to lunch with the Complainant because Hardin might go with them.

Phillips has a different view of the reasons for the termination of her friendship with the Complainant. Phillips states that the Complainant exhibited a somewhat erratic personality. On some days the Complainant was open and friendly. On other days, the Complainant would be sullen, uncommunicative or irritable. One could not predict from one day to the next which personality would be exhibited by the Complainant. This is consistent with the testimony of other witnesses for the Respondent. Phillips stated that the Complainant over time seemed to lose interest in their friendship and would no longer seek the company of Phillips. This friendship was not of sufficient value or interest to Phillips for her to pursue the Complainant for an explanation or to seek a renewal of their lunches. If the Complainant did not wish to be friends with Phillips then Phillips did not wish to be friends with the Complainant. Again, this pattern of starting out in a friendly manner only to have the Complainant become unpleasant or difficult was the subject of additional testimony from other witnesses.

The deterioration in the friendship between Phillips and the Complainant and the view that the Complainant possessed a somewhat mercurial nature is exemplified by what was called at hearing the lunchroom incident. This incident was the subject of testimony of at least three witnesses. The Complainant, Phillips and Debbie Gallagher-Vaccaro all had somewhat different versions. Most credible was that version told by Phillips. Gallagher-Vaccaro's testimony was somewhat more dramatic though her vantage point throughout the incident was somewhat limited. In most respects,

the Complainant's testimony agrees with Phillips description but is contradictory to that of Gallagher-Vaccaro.

The Hearing Examiner distills this description of the incident from the three witnesses. Phillips and another employee of the Respondent named Sabrina were seated in the lunchroom conversing in sign language. Sabrina had asked what was troubling Phillips. Phillips signed back that she was having a bad day because the Complainant was in one of her "bitchy" moods. At this point, the Complainant and Hardin walked into the lunchroom followed separately by Gallagher-Vaccaro. Apparently Sabrina turned to the Complainant and indicated that Phillips had just called the Complainant a "bitch". It is not clear from the record but the Complainant may have echoed what Sabrina had just said. The Hearing Examiner is convinced that the Complainant did not reply in kind to Phillips remark. Gallagher-Vaccaro having come into the situation just after the Complainant and Hardin only heard the Complainant say "bitch". Actually, she may have only heard Sabrina recounting Phillips signing of that word. Gallagher-Vaccaro testified that she saw Phillips sign the word "bitch". This is possible though not entirely certain.

The Respondent used this incident to demonstrate the Complainant's use of profanity in the work place. While there are several other undisputed incidents of the Complainant's unjustified use of profanity, this cannot be classified in that manner. To the extent that the Complainant uttered the word "bitch" in this incident, it seems clear that it was done in response to a provocation from Phillips. Phillips did not indicate that her remark was made as part of a continuing dispute or disagreement. Phillips, even though it put her in a somewhat poor light, straightforwardly testified that the Complainant had not called her a "bitch" and that she had been the person who started the incident.

The Complainant might have argued that this incident showed a prejudice against the Complainant on the part of Phillips. However the Hearing Examiner does not believe that to be the case. Phillips testified in a thoughtful, unemotional manner about the incidents comprising her experience of the Complainant. She gave testimony even when it did not necessarily reflect well upon her. She did not appear to have an axe to grind with either party. Phillips was a very credible witness.

The aftermath of this incident had some repercussions for the Complainant and this complaint. Gallagher-Vaccaro took it upon herself at the time of the incident to speak to the participants in separate groups about their conduct. She first spoke to Phillips and Sabrina telling them that their conduct was inappropriate.

Next, Gallagher-Vaccaro took the Complainant and Hardin outside and told them essentially the same thing. Within a day or two of the incident, Gallagher-Vaccaro spoke to Kincaid to alert him to the tension and problems that she believed existed in the production unit as exemplified by the lunchroom incident.

The Complainant asserts that things in her employment changed for the worse almost immediately upon her beginning a friendship with Hardin. This means that from the Complainant's perspective, there were no problems with her employment until approximately the last month of her employment. Hardin was hired on September 16, 1991. She and the Complainant became friends within one to two weeks of Hardin's date of hire. Both the Complainant and Hardin were terminated on October 25, 1991. It would appear that the Complainant and Hardin became friends somewhere between approximately September 23 and the end of that month.

In support of her position that there were no problems with her employment until she became friends with Hardin, the Complainant points to several incidents or events that occurred before she met

Hardin. These events include her being commended for her work in helping to organize the company picnic, her receipt of flowers from the company after a non-work related car accident, extension of an offer to use a company car until she obtained a new car after the accident and words of praise passed on to her by Gallagher-Vaccaro.

Of these incidents, the Hearing Examiner is most likely to find that the words of praise passed on to her is the most significant. Shortly after the Complainant joined Dorna Boore in the as yet not operational production unit, Kincaid told Gallagher-Vaccaro that he hoped that he could find more employees like the Complainant and Boore. Gallagher-Vaccaro passed this on to the Complainant. The Complainant attempts to make great significance of this comment. The Hearing Examiner might find some significance to the comment if it had occurred in late September or in October but he cannot give it much weight given the circumstances under which it was made.

It is important to bear in mind that the comment was made at a time when there was no production underway and that there were only two employees in the production unit. Both of these employees, the Complainant and Boore, were liked despite the fact that production would not start for several months yet, because of their years of electronics assembling experience. Any employer would hope to have more employees that have relevant experience and need only minimal training. Another factor that reduces the importance of the comment is that the Complainant had almost no actual work with the Respondent and none in actual production at the time of the comment. Under this circumstance, it could only refer to Kincaid's belief that the Complainant's experience and that of Boore would be beneficial in the future.

The fact that the Complainant received flowers from the employees of the Respondent after her car accident is insignificant. Gallagher-Vaccaro testified that it was typical of the Respondent to show concern for its employees in this manner. Gallagher-Vaccaro stated that similar things have been done for other employees in similar circumstances.

Similarly with respect to the use of a company car, this reflects the type of concern that the Respondent showed to its employees regardless of who they were. While use of a company car might normally be unusual, the Complainant needed to have access to a vehicle for errands at work because she was not yet engaged in production and it made sense to allow her to use the company car so that she could do these errands on her way to or from work.

The concern shown by the sending of flowers and the use of a company car was also reflected in an incident involving the Complainant's return to work ill after lunch. In this instance the Respondent allowed Hardin to drive the Complainant home because the Complainant was too ill to drive. Hardin was allowed to use a company car and to remain on company time while driving the Complainant home. This incident will be discussed later in this decision to the extent that it relates to a different claim of the Complainant.

The Complainant took as a positive sign the Respondent's asking her to help plan and carry out the company picnic. She was complimented on the effort she made. This is not an important incident in the overall scheme of this case. The company picnic occurred at a time when there was little for the Complainant to do because the production unit was not yet operational. The Complainant was easily available and could be spared to work on such an event.

The Complainant does not bring to light any problems that she may have had during this period. The Respondent through the testimony of Bill Riederer, the Complainant's immediate supervisor, and Kincaid raise doubts about the Complainant's fault-free employment. Both testified that the

Complainant had been counseled several times during this period about her inability to get along with the only other employee in the unit. Boore complained on more than one occasion that the Complainant would not speak with her. Boore did not know if she had done something wrong or if there was some other problem. Other employees testified to having been given the "silent treatment", by the Complainant. Riederer specifically spoke to the Complainant about her needing to get along with Boore. These warnings appeared to have little effect on the Complainant. These problems were repeated when a third employee, Joann Mauss, was added to the Production unit in early September. Again Riederer spoke to the Complainant about her inability to get along with her co-workers.

The Complainant contends that she noticed that she began to be treated less favorably after she began her friendship with Hardin. As indicated above, the earliest that this could have happened was around September 23, 1991. The Complainant states that this change in attitude towards her began almost immediately. One problem with this suggested scenario is that the Respondent only began to hire additional employees for the production unit at about the same time that it hired Hardin. For instance, Carmen Klukas began work on the same day as Hardin, Lori Kelly was hired on or about September 23, 1991. Tina Byington was hired on or about September 25, 1991. Dawn Bailey and Kristin Anderson were hired on or about October 14, 1991. These are the only precise dates of hire stated on the record though there were a few more employees presumably, such as Sabrina, hired in the same time frame. Since the majority of the production unit employees were hired at about or subsequent to the start of the friendship between the Complainant and Hardin, it is difficult to see how the Complainant's relationship with other production unit employees could have been affected by the friendship.

The record reflects that as of the earliest date for the beginning of the friendship between the Complainant and Hardin, September 23, 1991 that in addition to the Complainant and Hardin, there were only four other unit employees: Dorna Boore, Joann Mauss, Carmen Klukas and the supervisor, Bill Riederer. The testimony clearly indicated that the Complainant had difficulty with Boore and Mauss before Hardin had been hired and that Riederer had spoken to the Complainant about these problems at the time. Klukas testified that she felt that initially she had gotten along well with the Complainant but that the Complainant had become moody and difficult to work with, sometimes refusing to speak with her. Klukas testified that she did not have any similar problems with Hardin and believed that she got along well with her.

Putting this problem to one side for the moment, the Complainant points to several incidents that she believes were racially motivated. The precise timing of these incidents is not clear from the record. Neither side was able to give much assistance in identifying either the precise dates or even the actual sequence of incidents. In general, this lack of precision permeated both the hearing and the briefs of the parties. Neither party wished a hearing transcript. Without the transcript to give a point of reference, the parties' briefs are at best impressionistic in their recounting of the details of the hearing. This can make the task of the Hearing Examiner somewhat difficult when trying to differentiate between fact, argument and perception. However, the Hearing Examiner will attempt to reconcile the hearing record and the positions of the parties. Some events will inevitably remain unfixed with respect to their timing.

One incident that the Complainant points to specifically as showing the change in attitude of employees and also the racial feelings of her co-workers involved an at work illness of the Complainant. The Complainant and Hardin went to lunch at a local Lum's. During the lunch, the Complainant became ill. Hardin drove the Complainant back to work. The Complainant was ill in the car and again in the parking lot at work. Hardin had found a parking place close to the entrance of the building. Both Hardin and the Complainant testified that they saw Kincaid entering the building as

they called to him for assistance. They both believed that Kincaid was aware of the Complainant's difficulties. Kincaid did not do anything to assist the Complainant and Hardin. Subsequent to Kincaid's entering the building, Gallagher-Vaccaro was leaving for lunch. She met the Complainant and Hardin on their way into the building. Gallagher-Vaccaro saw that the Complainant was very ill. She helped them back into the building and took the steps necessary to gain the Complainant's excuse from work and to get access to a company car to allow Hardin to drive the Complainant home. After some slight delay caused by the Complainant's desire to stay at work for financial reasons, Hardin drove her home in a company car.

Even if the Hearing Examiner accepts the Complainant's testimony and that of Hardin to the effect that Kincaid saw the problems of the Complainant and did nothing about them, there is nothing in the record demonstrating that this conduct was as a result of any racial prejudice on the part of Kincaid or any feelings that Whites and Blacks should not associate. There is nothing in the record that would indicate that Kincaid would have acted in a contrary manner prior to the Complainant and Hardin becoming friends. In short, this incident fails to demonstrate what the Complainant claims.

Related to this incident is the alleged reaction of the Complainant's co-workers to her illness. The Complainant asserts that as she sat at her work station in apparent misery and distress, she heard co-workers at the next table laugh and she heard the word "drugs". The Complainant, early in her testimony, stated that she also heard Hardin's name mentioned during this conversation. As her testimony continued, the Complainant backed away from this early testimony. The Complainant, from these facts, concluded that her co-workers believed that she was ill because she and Hardin had undoubtedly been doing drugs at lunch because Hardin is Black. The Complainant based her conclusion on her understanding of a stereotype that asserts all Blacks use drugs.

The Hearing Examiner cannot reach the same conclusion as the Complainant. There is absolutely no evidence in this record to support a finding that the Complainant's co-workers were belittling her illness because of their belief that she and Hardin had been doing drugs. The record is devoid of any evidence from which the Hearing Examiner could conclude that the Complainant was even the subject of her coworkers comments. When given the opportunity to explain the basis of her conclusions about her coworkers conduct, the Complainant was unable to testify about anything other than her belief about the likely stereotypical views of her co-workers.

This is simply not a factual basis for such a finding. First, there is no evidence that the workers at the next table were even aware of her condition. Next there is no evidence that the snatch of conversation overheard by the Complainant concerned the Complainant. While the Complainant's concern over the untruth of stereotypes such as the one in question here is commendable, her sensitivity to them has lead her to a conclusion that is insupportable on the facts.

The Complainant also contends that her supervisor, Bill Riederer, ignored her for a significant period of time while she was at her work station in obvious distress. The Complainant asserts that Riederer's conduct was influenced by her friendship with Hardin. The testimony of Gallagher-Vaccaro and Riederer cast serious doubt on the Complainant's version of events. Gallagher-Vaccaro testified that she had cleared the Complainant's early departure and use of a company car with Kincaid and presumably Riederer. This makes sense since Riederer would need to know how to cover for both the Complainant and Hardin on the work floor. Riederer testified that he had spoken with the Complainant on a couple of occasions that afternoon about her going home because of illness. Riederer stated that the Complainant had told him that she wanted to stay at work because she needed the money.

The Hearing Examiner does not find the Complainant's testimony on this point credible. In general, the Complainant's testimony lacks precision and definition. The contrary testimony of Gallagher-Vaccaro and Riederer, and to some extent even that of Kincaid, is clear and is consistent with the everyday needs of a production facility. The fact that the Respondent was willing to have another employee take productive time away from work and provided a company car to ferry the Complainant home tends to show an employer that is concerned for the well being of its employees and not one engaged in a consistent pattern of discrimination.

Another incident pointed to by the Complainant involves comments allegedly made by a co-worker, Tina Byington, after a component recognition exercise. In this incident another employee, Sabrina, approached the Complainant and Hardin and stated that Byington had called Hardin a "dummy" and the Complainant a "bitch". The Complainant and Hardin were both upset and told Riederer about the incident. They asked Riederer to speak to Byington about the incident. The Complainant made it clear to Riederer that she believed that the incident was racially motivated because of Hardin's race and her friendship with Hardin. Riederer told the Complainant and Hardin that he would speak to the others but that they should not be part of the problem by passing on to each other negative comments that they might hear. The Complainant does not believe that the Respondent properly investigated or pursued these allegations of racial harassment on the work floor.

Byington denied having made the underlying statements. She also stated that she had no particular feelings about Hardin one way or another. Riederer asserts that he spoke to Byington about the incident as he told the Complainant and Hardin he would. He also told Kincaid about the allegations of racial discrimination even though he personally did not believe that race was a factor. Kincaid spoke to Hardin about the incident individually. He also spoke to the whole group of production employees at a group meeting held on the production floor. In addition to the topic of team work and tension on the production floor, he specifically addressed the issue of discrimination and indicated that it would not be tolerated at the Respondent's work place.

Even if Byington made the statements that are alleged in this proceeding, there is nothing on this record that makes the statements incontestably motivated by race. It is uncontroverted that Hardin performed very badly on the component recognition exercise. Hardin herself admitted as much at the time of Hearing. Byington is young and appears relatively unsophisticated. It is not unbelievable that she could make such an observation aside from racist sentiments. Again, the Complainant's sensitivity to any statement that might have adversely implicated her friend has led her to believe the worst of people. This loyalty is admirable but the consequences must be examined.

Whether Byington actually made the statements or not is irrelevant to the issue of whether the Respondent through its management acted appropriately or not. Riederer did precisely what he told the Complainant and Hardin he would do. He spoke to Byington about the incident and apparently warned her not to add to the tension already existing in the production unit. Even though Riederer did not believe that the incident was racially motivated, he took the Complainant's concerns to his supervisor, Kincaid. Kincaid spoke to Hardin, the person most closely involved in the incident, about his concerns. Kincaid called a meeting of the entire production unit and spoke to them about acceptable conduct and specifically the fact that discrimination would not be tolerated at the work site. It is uncontested that there were no further incidents like this one after that meeting.

The Complainant argues that the Respondent should have performed an in-depth investigation and punished anyone involved. The Complainant also contends that one cannot say that the Respondent's efforts were effective because the Complainant and Hardin were terminated soon after the group meeting.



The Hearing Examiner disagrees. The Respondent owes its employees a harassment free work environment. So long as it provides that environment, the Complainant does not have to be satisfied with the steps that the Respondent takes. Lee v. City of Richmond, 456 F. Supp. 756 (D.C. Va 1978), Fekete v. U.S. Steel Corp., 353 F. Supp. 1177 (D.C. Pa 1973), Barrett v. Omaha National Bank, 33 EPD para. 34, 132 (8th Cir. 1984), Owen v. American Packaging Co., (LIRC, 02/01/91), Hubbard v. Taylor Enterprises, (LIRC, 08/15/86). This record shows that the first person to whom this issue was raised, Riederer, spoke to all those involved in the complaint. He promptly raised the issue with the appropriate level of management. Management then took steps to place the entire work unit on notice that similar conduct was not acceptable and would not be tolerated. There were no further incidents of harassment. While it is true that the Complainant and Hardin were not employed for a significant period of time subsequent to the meeting, the fact is that there were no repetitions of even allegedly racial insults in the work place. For the type of problem, the Hearing Examiner concludes that the Respondent acted properly and promptly.

The remaining contention of the Complainant is that subsequent to her becoming friends with Hardin, her supervisor, Bill Riederer, stopped speaking with her and would refuse to answer her legitimate work related questions. She asserts that she observed this to be true with respect to Hardin as well.

The only specific instance that anyone could testify about at the time of hearing involved Hardin. In this incident, Hardin asked Riederer how to perform some procedure. Unfortunately for Hardin, this was while she was being tested on the procedure. Riederer told Hardin that he could not help her without ruining the purpose of the test. Hardin told her friend, Marnice Dorsey about the incident. Dorsey told Hardin that Riederer could not have told her what to do in that instance. Neither the Complainant nor Hardin could testify to any other specific time or circumstance when Riederer would not answer questions or ignored them.

It seems typical of the Complainant's testimony to make a broad allegation and then not to be able to point out specific events or incidents. It is not sufficient to demonstrate discrimination for the Complainant to be unable to document facts or to point to specific incidents that support her claims.

It is primarily these incidents that led the Complainant to believe that her termination resulted from her friendship with Hardin. There was nothing about the actual termination that tends to show that the Complainant was terminated as a result of her friendship other than the fact that Hardin and she were terminated at the same time. It is undisputed in this matter that Hardin was terminated due to her inability to perform the duties of the job. Hardin did not bring an action on her own behalf and, in fact, thanked Kincaid at the time of her termination for having given her the opportunity to try the work. The Complainant could not think of any reason for which she could have been terminated other than her friendship with Hardin.

Her own words are somewhat revealing in this respect. At hearing she stated that she couldn't think of anything that they could have gotten her on. This reflects an attitude of entitlement to the job that is unrealistic particularly for an employee who is still in her probationary period.

The Respondent stated three reasons for the Complainant's termination: the Complainant's use of profanity in the work place, the Complainant's inability to work well with others and the Complainant's failure to perform her actual job duties. None of these reasons were given at the time of termination.

The Complainant sought to attack these proffered reasons by demonstrating that each reason by itself was insufficient to terminate the Complainant. It is clear from the testimony that the Respondent

admits that the Complainant was terminated for a combination of reasons and not for one reason alone. For instance, the Complainant's error on the soldering test by itself may not have led to the Complainant's termination particularly if she was a novice to the position. Carmen Klukas testified that she had made mistakes on the same test but she was not terminated. However, Klukas did not have in excess of 17 years of electronics assembling experience as did the Complainant. Kincaid clearly stated that the Complainant was given beneficial consideration at the time that she was transferred to the production unit because of her experience. The type of error made by the Complainant was especially bad because of her experience. Her performance on the soldering test was not the only aspect in which the Complainant had been failing in her performance. Kincaid testified that the Complainant had failed to correct mistakes on the production line that she should have identified and corrected. Kincaid attributed this lack of performance to the Complainant's being more interested in looking around at other workers than in doing her job. This was particularly troubling in light of the Respondent's efforts to establish a team concept. In this method of production, one employee can stop the passage of an item to correct an error made at an earlier step of production.

This is intended not to slow the process but to insure the high quality of the finished product at a minimal cost to the quantity of production. In this way there was a nexus between the Complainant's inability to get along with her co-workers and her inability to perform the duties of her job.

Similarly there is a connection between the Complainant's use of profanity and her inability to get along with co-workers. It seems clear that other people used profanity at the work site, for example, there is the lunchroom incident involving Shannon Phillips. However, the record indicates that such instances were isolated or occasional. There was no indication that such incidents were repeated after an employee had been warned. On the other hand, the Complainant admitted to at least three occasions some of which occurred after she had been warned to make a greater effort to get along with her co-workers. Typical of the somewhat absurd twists this hearing took was the time spent by the parties trying to ascertain whether the Complainant called Cheryl Jensen a "fucking bitch", a "frigging bitch" or a "fricking bitch". Under the circumstances any of the precise words are inappropriate. They are all the more inappropriate given the public and casual nature of the comment after having been warned about such conduct. It appears to the Hearing Examiner that this incident in combination with the Complainant's obvious error on the soldering test was the straw that broke the camel's back and led to her termination.

Certainly one of the primary reasons for an employer to discourage or prohibit the use of profanity in the work place is the effect that such language may have on the working relationship between co-workers. It is not uncommon for people to have different levels of acceptance with respect to the use of profanity. The problems are amplified where the profanity is directed at co-workers or managers. The disruption that the use of such language causes often, as here, has adverse effects on productivity and the development of teamwork. This is typified by the testimony of Sean Widish. Widish was working on a project with Jensen. As he passed the Complainant's work station, she asked Widish how he could stand to work with that "bitch" referring to Jensen. The report of this incident made the rounds of several employees and caused Jensen some personal anguish. She took productive time from the company to track down what the Complainant had been saying about her and to whom. Jensen's actions were not extreme but inevitably caused a loss of effort and disruption in the work place.

As is often the case, the testimony about the Complainant's general ability to work with others was divided along the lines of the separate parties. The differences in the testimony can be distinguished. The Respondent's position has been described in this decision to this point. The Complainant introduced the testimony of several employers and co-workers to show that the Complainant was a

good worker and easy to get along with. This testimony involved employment situations that were substantially different from that during the Complainant's employment with the Respondent.

Dale Baldwin testified that the Complainant is his only employee and essentially does all of the work of Isthmus Scientific herself. Baldwin testified that the Complainant's electronic assembly work was probably better than his own. This employment does not really compare with that of the Respondent. Baldwin recognized that the situations were not really comparable. The Complainant works by herself on different projects more or less at her own pace. She does not have the distraction of other co-workers to draw her into conflict.

Other witnesses testified about the Complainant's employment at Kohl's as a cashier and at a Kwik Trip in a similar position. In the case of Kohl's, Tim Start testified that the Complainant was extremely loyal to him and did not take part in work place politics. The Complainant's loyalty is not at question. She demonstrated that quality with regard to her relationship with Hardin. However, it is not a quality that she shared universally with all of her contacts. Shannon Phillips is an example of a friendship that was allowed to lapse. While Start testified earnestly about the Complainant's fine qualities, he had no knowledge of the Complainant and her conduct while employed by the Respondent or the conditions of her employment with the Respondent. Similarly, Roger Bakken and John Trumble both testified about the Complainant's work at a Kwik Trip. While they both felt that the Complainant's position required her to work under some degree of pressure, they testified that the Complainant got along well with her co-workers and customers. It is difficult to see how the circumstances of this employment and that with the Respondent are comparable. The Complainant in her post-hearing briefs did not attempt to make that comparison. It is interesting to note that all of the Complainant's witnesses testifying about her ability to get along with other employees were men, while those with whom she did not get along at the Respondent's were women. The Hearing Examiner is not able to draw any strong conclusion with respect to this point of interest, but it is an example of differences between Complainant's employment with the Respondent and her employment with other employers.

The Complainant has argued that it is important to recognize that discrimination could take place against a White for that person's association with a Black even though the Black is not the victim of discrimination him or herself. This observation is correct but is not born out by the evidence in this record. The Complainant correctly states that Hardin was not the victim of discrimination. As stated above, Hardin recognized that her termination stemmed from her inability to perform the work. Hardin also testified that she got along well with other employees prior to becoming friends with the Complainant. Mary witnesses testified that they liked Hardin.

The question arises did the change that Hardin felt occur because of an inter-racial friendship or because of association with a person who was already disliked. The record, as described above, supports the latter conclusion. It is true as the Complainant points out that associational based discrimination is more insidious and in many respects more serious than discrimination against a minority because of the chilling effect that such discrimination has on contact between or among groups. However, not every relationship between a White and a Black leads to that form of discrimination. Here the Complainant has failed to demonstrate that associational based discrimination caused her termination or that her conditions at work suffered as a result of her friendship. The Complainant's sensitivity to possible discrimination involving her friend is admirable and is to be commended. However, her failure to consider other possible motives for the problems that she observed reflects a single mindedness that does not do the Complainant's more egalitarian attitudes justice.

The Respondent is not entirely without some level of blame for the situation that developed here. The lack of clear, written and distributed personnel policies covering probation, discipline, discrimination and setting forth a code of conduct has undoubtedly contributed to the Complainant's perception of unjust treatment. The chaos of starting up a production unit also played a part in the misunderstandings giving rise to this complaint. The Hearing Examiner hopes that the Respondent has taken the time to put in place a personnel manual that is distributed to all employees setting forth the Respondent's expectations of the and the rights that they can enforce. This would go a long way towards eliminating problems like those that arose in this case.

For the foregoing reasons the Hearing Examiner finds that no discrimination has occurred in this case and that the complaint should be dismissed.

Signed and dated this 2nd day of September, 1994.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III  
Hearing Examiner