EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
351 WEST WILSON STREET
MADISON, WISCONSIN

Perry Monroe 512 West Wilson Street, #307 Madison, Wisconsin 53703 Complainant vs. Swiss Colony, Inc. 3650 Milwaukee Street Madison, Wisconsin 53704 Respondent	RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER Case No. 2534

On August 19, 1980, a hearing was held in the above-entitled matter at Room 111 of the City-County Building, 210 Monona Avenue, Madison, Wisconsin. The Complainant appeared in person; the Respondent appeared by Attorney Timothy Sweeney of Walsh, Walsh, and Sweeney, and Ms. Pat Freeders sat in as Respondent's employee-representative.

The original complaint in this matter alleging discrimination on the basis of race in discharge was filed with the Madison Equal Opportunities Commission (MEOC) on November 7, 1979. The Complaint was investigated by MEOC investigator Renee Caldwell who issued an Initial Determination of Probable Cause dated March 13, 1980.

Respondent waived conciliation, and the case was certified to public hearing on April 18, 1980.

The findings of fact, conclusions of law and order are as follows:

RECOMMENDED FINDINGS OF FACT

1. Complainant, a Black male, began seasonal employment with the Respondent, Swiss Colony, Inc., on September 24, 1979 as a fork-lift driver.
2. Respondent is a corporation doing business in the City of Madison, Wisconsin.
3. Complainant was 1-1/4 hours late for work on September 26, 1979. Although this would normally be considered an absence, according to Respondent's written policies, the Complainant was only charged with being "late."
4. Complainant was subsequently absent on October 3, 1979, and October 10, 1979.
5. On October 11, 1979, Complainant received a written warning stating that he was a good worker and a quick learner, but a third absence would result in probation.
6. Complainant was subsequently absent on October 23, 1979 and November 5, 1979.
7. All four of Complainant's absences were "no call" absences; i.e., he failed to call the employer to notify that he would be absent.
8. Complainant was terminated by Respondent on November 6, 1979 for excessive absence in accordance with Respondent's policy and procedure.
9. Respondent's policy required termination of an employee after four absences. Arriving more than 30 minutes late or leaving more than 30 minutes early from a shift was considered an absence.
10. Three tardies also constituted an absence. A tardy was given for arriving less than 30 minutes from the start of a shift or leaving less than 30 minutes before the end of a shift.
11. Complainant stated that he believed Don Schaeffer and one other White seasonal employee had been permitted more absences than Complainant prior to termination but Complainant did not produce other evidence that any White employees had been permitted more absences than Complainant prior to termination.
12. Don Schaefer was dismissed after four absences, a combination of two "call-in" absences and two "no call" absences. Prior to his termination, he also appears to have been late once by 45 minutes and left early once, but both times were with the supervisor's authority.

RECOMMENDED CONCLUSIONS OF LAW

1. Complainant is a member of a protected class as defined by sec. 3.23, Madison General Ordinances.

2. Respondent is an employer as defined by sec. 3.23, Madison General Ordinances.
3. Complainant was qualified to do the job, but was terminated in accordance with Respondent's policies and procedures.
4. Complainant failed to establish a prima facie case of discrimination by failing to show that any non-Black employees had more absences than Complainant prior to their termination.
5. Complainant was not discriminated against by Respondent on the basis of race in violation of sec. 3.23(7)(a) of the Madison General Ordinances.

RECOMMENDED ORDER

This complaint be and hereby is dismissed with prejudice.

EXAMINER'S OPINION

I. MOTION TO DISMISS

The Respondent's motion to dismiss this complaint on the grounds of res judicata and/or collateral estoppel prior to the hearing was denied.

Respondent argued that the Wisconsin Equal Rights Division investigative finding of no probable cause, followed by the EEOC's finding of no reasonable cause should have mandated Madison Equal Opportunities Commission's (MEOC) dismissal of the complaint.

The examiner denied this motion to dismiss on the grounds that the principles of collateral estoppel and res judicata by definition only apply where some matter or issue has been judicially acted upon or decided.

In an administrative hearing where there has been an opportunity to present witnesses, cross-examine witnesses under oath, authenticate documents, and other due process rights afforded, the argument that collateral estoppel and/or res judicata might apply could have some validity. However, the Respondent offered nothing more than hearsay evidence to support its position that either or both of the doctrines should be applied.

The evidence offered was a Wisconsin Equal Rights Division investigative report and a concurrence in such report by the federal EEOC. The Wisconsin report is the opinion of an investigator based on his/her findings. Such findings afford few of the crucial due process protections that are required of litigation, judicial or administrative. In this particular case, the Complainant was compared to an unnamed white male who was determined to have been treated the same as Complainant. By Respondent's attorney's own statement, the state investigator based his/her findings on Respondent's representations and not on an examination of the White male's personnel file.

Even had such documentary been provided and examined, it is still evident that the doctrines of res judicata and collateral estoppel are inappropriate grounds to dismiss a complaint where the sole reliance for advancing those arguments is on investigative reports of other administrative agencies, albeit state and federal agencies.

II. MOTION TO DISMISS FOR FAILURE OF COMPLAINANT TO ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION

It is conceded by Complainant that, despite his having been considered a good worker, his discharge was in accord with company policy. It is his contention, however, that some white employees received additional (more than four) absences prior to being terminated by Respondent.

However, the burden is on the Complainant to establish a prima facie case of discrimination, McDonnell Douglas Corp. vs. Green, 411 U.S. 792, 5 EPD 7783, 7787, (1973).

Other than Complainant's testimony that at least two White employees were allowed more than four absences prior to their termination, no other evidence (such as testimony of a co-worker, records, documents, and so on) was presented to support this belief.

Complainant's testimony that two White employees stated to him the information is insufficient evidence by itself to carry Complainant's burden of proof that these Whites had actually received the extra absences prior to termination.

The employee records of Don Schaeffer, one of the employees referred to by Complainant, are not consistent with Complainant's testimony. Further, Complainant did not know the name of the other White employee, and Complainant like Don Schaeffer was once marked "late" where he could have been marked absent.

Therefore, Complainant did not carry his burden to establish a prima facie case of disparate treatment on the basis of race in discharge, and the Respondent's motion to dismiss for failure of the Complainant to establish a prima facie case of discrimination was granted.

Dated this 5th day of September, 1980.

Allen T. Lawent
Hearing Examiner