

**EQUAL OPPORTUNITIES COMMISSION  
CITY OF MONONA  
210 MONONA AVENUE  
MADISON, WISCONSIN**

<p>Rufus Jackson 343 West Main Street Second Floor Madison, WI 53703</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Madison Club 5 West Wilson Street Madison, WI 53703</p> <p style="text-align: center;">Respondent</p>	<p>RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER</p> <p>Case No. 2715</p>
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A complaint was filed with the Madison Equal Opportunities Commission (MEOC) on November 10, 1980 alleging discrimination on the basis of race and sex in regard to employment. Said complaint was amended on December 8, 1980 to reflect the correct date of filing.

Said complaint (as amended) was investigated by MFOC Human Relations Investigator Renee Caldwell (presently Renee Payne). An Initial Determination, dated February 19, 1981, was issued finding probable cause to believe that discrimination had occurred as alleged.

Conciliation was waived and/or unsuccessful and the matter was certified to public hearing. A hearing was held on July 14, 1981. Attorney Jeff Scott Olson of JULIAN AND OLSON, S.C. appeared on behalf of the Complainant who also appeared in person. Attorney James K. Ruhly of MELLI, SHIELS, WALKER AND PEASE, S.C. appeared on behalf of the Respondent who also appeared by employee-representative Donald Sengbusch. Based upon the record of the hearing and after consideration of the post-hearing briefs submitted by the parties, the examiner proposes the following Recommended Findings of Fact, Conclusions of Law, and Order:

**RECOMMENDED FINDINGS OF FACT**

1. The Complainant, Rufus Jackson, is a black male residing in the State of Wisconsin.
2. The Respondent, Madison Club, is a private club located in the City of Madison and employs individuals at its City of Madison location.
3. The Complainant was hired by the Respondent in late May of 1980 to begin work on June 2, 1980. The Complainant was hired in the Maintenance Department and performed laundry duties as well as maintaining the employee's lunch room.
4. The Respondent's work force is divided into several departments including the Bar, Office, Kitchen, Maintenance, and Dining Rooms. Each department is headed by a supervisor or supervisors. The supervisor or supervisors have the authority to hire and fire employees in their respective department. Club Manager Donald Sengbusch has never interfered with a supervisor's hire or fire decision since becoming the Respondent's Club Manager in September, 1980.
5. Since at least sometime in June of 1980, the co-supervisors in Respondent's Maintenance Department have been Michael King and Dan Thomas, although at some point in 1981, Thomas was made department head and King is now his assistant. Thomas was primarily responsible for the laundry room employees, including Jackson, in October, 1980.

6. The Complainant was scheduled to work from 11:00 a.m. to 7:00 p.m. on Thursday, October 16, 1980. He failed to come into work and did not call in on that day. He had instead gone to a job interview in Baraboo, Wisconsin in the morning. He had been driven by a friend, and returned to Madison sometime in the afternoon.

7. Jackson came into work on Friday, October 17, 1980. Before punching in, co-supervisor King asked him why he (Jackson) had not been to work on the previous day. Jackson responded that he had gone to a job interview and did not have time to call the Respondent. King proceeded to the office that he and co-supervisor Thomas shared and discussed Jackson's conduct of the previous day with Thomas. King and Thomas agreed that unless Jackson had a "compelling" reason for not having shown up on October 16, they would have to terminate him. They also agreed that Jackson should be given a chance to provide a further explanation prior to their taking any action. King and Thomas left their office and proceeded to the laundry area where Jackson was just commencing work (it was shortly after 11:00 a.m. on October 17, 1980).

In response to Thomas' question regarding why he (Jackson) had been absent on October 16, the Complainant again explained he had been to a job interview. Thomas told Jackson his "explanation" was not "good enough" and told him that he was fired. Jackson punched out shortly thereafter.

8. Jackson was terminated for failing to report to work as scheduled, not calling in on that day to report his absence, and failure to provide an adequate excuse for both of those failures. King prepared a report summarizing the reasons for Jackson's termination, Thomas signed the report, and the report was submitted to the Payroll Office which issued Jackson's final paycheck that he (Jackson) picked up later in the day on October 17, 1980.

9. Jackson was replaced by Janet Curley, a white female, who had been a regular part-time laundry area employee prior to Jackson's discharge. Curley was later replaced by Greg McLinn, a male.

10. Prior to October 16, 1980, Jackson had called in on a particular day to indicate he would not be able to work that day. Thomas was informed that Jackson would not be in to work and Jackson was not terminated. Jerry Brown, a black male Maintenance Department employee, had arranged in advance for time off to take a State employment examination and was permitted the time off without being terminated.

11. Chris Perry, a white male, was employed in the Maintenance Department. He failed to appear for work as scheduled on October 25, 1980. He also failed to call in on October 25 and was terminated on October 26, 1980 by co-supervisor King. His timecard was pulled, and on October 27, 1980 (a Monday), Perry's final check was issued by the Payroll Department. On October 29, Perry came in to work. King had a day off. As Thomas began to ask Perry for an explanation, Perry said he was quitting.

12. Rudy Schaller, a white male, was terminated by the Respondent's supervisor (chef) Zakiewski, on January 19, 1981 after he failed to report for work as scheduled and failed to call in.

13. Ellen Hendrick, a white female, was terminated by Bookkeeping/Payroll supervisor Bev Snyder on January 22, 1981 for failing to report for work as scheduled and failing to call in.

14. Kevin Doyle, a white male, was fired in May, 1981 by Dining Room supervisor (Lake Room Manager) Vince Holsten, for not showing up for work as scheduled and not calling in.

15. Dale Bormett, a waiter, and Lisa Huggens, a cook or cook's assistant, were Kitchen employees who were not terminated by the Respondent's supervisors. Both Bormett and Huggens are white; Bormett is a male and Huggens is a female. Bormett and Huggens did not have the same supervisors as the Complainant.

16. Jackson (through the time of the hearing in this matter) had never (re)applied for a job with the Respondent subsequent to his termination.

17. Jackson was making \$3.45 per hour and working 20 hours per week just prior to being terminated by the Respondent on October 17, 1980.

18. Jackson has worked part-time on and off at the following jobs subsequent to his discharge from the Madison Club:

- a. Cardinal Hotel from October 25, 1980 to January 17, 1981;
- b. Security Specialists infrequently;
- c. Landmark Security;
- d. 111 West Main (a bar);
- e. M & F Security;
- f. City-Wide Security (on call); and
- g. Cardinal Bar.

19. The Complainant was considered by the Respondent to be "good" employee prior to his termination. On October 2, 1980, Supervisor King wrote the following letter of recommendation for the Complainant:

Rufus Jackson is an exemplary employee. His tireless effort and positive attitude have a good affect\* on other employees. He is consistently on time. He has a quick mind and applies himself readily. In short, he is a pleasure to have on the job.

\*The spelling used in the letter.

### **RECOMMENDED CONCLUSIONS OF LAW**

1. The Complainant is a member of the protected classes of race and sex within the meaning of Section 3.23, Madison General Ordinances.
2. The Respondent is an employer within the meaning of Section 3.23, Madison General Ordinances.
3. The Complainant has exercised reasonable and due diligence in obtaining employment since his discharge by Respondent.
4. The Respondent did not discriminate against the Complainant on the basis of race in violation of Section 3.23, Madison General Ordinances by terminating him from his job in Respondent's Maintenance Department.
5. The Respondent did not discriminate against the Complainant on the basis of sex in violation of Section 3.23, Madison General Ordinances by terminating him from his job in Respondent's Maintenance Department.

### **RECOMMENDED ORDER**

That this case be and hereby is dismissed.

### **OPINION**

The Complainant, a black male, contends that his discharge and subsequent replacement by a white female constituted race and sex discrimination. There is no dispute that the Complainant was a "good" employee prior to his termination. He was terminated pursuant to an unwritten policy of the Respondent that authorized the termination of employees who failed to report to work on a scheduled work day, failed to call in on that day (presumably during the working shift), and could not provide a "compelling" excuse for the combined failure (of not reporting to work and not calling in). The policy is neutral on its face. However, this is not a disparate impact case,<sup>1</sup> but is a disparate treatment case;<sup>2</sup> i.e., the issue is not the statistical legitimacy of the Respondent's policy but is whether or not the Complainant can show by a preponderance of the evidence that he was treated differently than non-blacks and/or females in the Respondent's application of the policy.

It is clear from the evidence that four employees in addition to the Complainant were terminated for the identical reason as the Complainant. The four other employees were white: three males and one female. One of the white male employees was terminated by the same supervisor(s)<sup>3</sup> as terminated the Complainant: Chris Perry. Perry was terminated prior to the Complainant having filed his discrimination complaint with the MEOC. The other three employees were terminated subsequent to the filing of the complaint and were terminated by supervisors in other departments.<sup>4</sup>

It is also clear that two white employees, Lisa Huggens, who is female, and Dale Bormett, who is male, were not terminated for the same policy infraction as the Complainant. Both Huggens and Bormett were Kitchen

employees and consequently under the direction of different supervisors than the Complainant. At least in Bormett's case, the infraction occurred prior to the Complainant's termination.

Further, the evidence shows that not only was the Respondent's policy administered differently by the various supervisors but that the interpretation of a "compelling" excuse is left entirely to the discretion of the supervisor. However, the Respondent's various departments (Bar, Office, Maintenance, Dining Room, Kitchen) operate autonomously in respect to the hire and fire of employees. The supervisor or supervisors in each department are not interfered with by management (specifically Club Manager Sengbusch) in their hire and fire decisions.

The issue essentially narrows then to whether there is evidence that employees in the Maintenance Department were treated in a discriminatorily disparate manner.<sup>5</sup> Both a white and black employee were terminated for the identical infraction. There is no credible<sup>6</sup> evidence that any Maintenance employees violated the Respondent's policy and were not terminated. Further, it is clear that the Complainant called in on one occasion prior to October 16, 1980 to indicate that he would be absent that day and was not terminated. Also, a Jerry Brown, who is a black employee in the Maintenance Department arranged for and was granted time off (without being terminated) to take a State employment examination, a similar reason to that for which the Complainant missed work on October 16, 1980.

While I find overall, then, that the Complainant has not shown pretext and has not met his burden of proof to establish discrimination on the basis of either race or sex,<sup>7</sup> I do find his termination to be very unfair. Essentially, he was a very good employee who was discharged for a single infraction (the combination of missing a day of work, not calling in on that day and not having a "compelling" excuse). I would suggest to the Respondent that a written policy of progressive discipline would likely be a more humane and even-handed policy. Then, instead of having a "maternal"<sup>8</sup> supervisor in the Kitchen who does not enforce company policies while having more strict supervisors elsewhere in the operation, the Respondent would have a consistent policy that could take into account tardinesses<sup>9</sup> as well as absences, weighting them for whether or not the employee had called in or not. Such a policy would likely be more rational, objective, and if appropriately administered, could have prevented the harsh consequences suffered by a "good" employee like the Complainant. I would further state that if the Complainant had been a Kitchen employee, under the facts presented here I would have found at least race discrimination. Under the facts presented here, however, I find Jackson's discharge very disturbing, but not unlawfully discriminatory.

Signed and dated this 24 day of September, 1981.

Allen T. Lawent  
Hearing Examiner

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#### FOOTNOTES

1. Griggs v. Duke Power, 401 U.S. 424, 3 FEP cases 175 (1971 ).
2. The Complainant clearly established a prima facie case of discrimination on the basis of both race and sex applying a Flowers v. Crouch-Walker standard (See 552 F. 2d 1277, 14 EPD 7510):
  - (1) He is a member of a protected class (race, sex).
  - (2) He was qualified for the job that he was performing.
  - (3) He was satisfying the normal requirements of his work.
  - (4) He was discharged.
  - (5) After his discharge, the employer assigned a white female employee to perform the same work.

Only element (3) is at issue. The question is whether the Complainant's failure to report to work as scheduled combined with his failure to call in on the scheduled day and his failure to provide a "compelling" excuse precluded him from establishing element (3). However, by showing that two other employees (Dale Bormett and Lisa Huggens, both white, one male and one female) of the Respondent's had violated the same rule, the Complainant successfully established element (3) under a Flowers analysis. Even if I were to apply a Brown v. A. J. Gerrard Mfg. Co., \_\_\_ F 2d. \_\_\_, 25 FEP cases 1089 (5th Cir, 1981) analysis as the Respondent urges, the Complainant still established a prima facie case of discrimination at least for race by showing that two white

employees had violated the same work rule and were still employed. The burden then shifted to the Respondent to articulate a legitimate, non-discriminatory reason(s) for discharging the Complainant. The Respondent successfully articulated a departmental autonomy argument which the Complainant failed to show was either pretextual or lacking in credence.

3. Dan Thomas and Michael King (see Recommended Finding of Fact 5).

4. The Examiner rejects the application of Parham v. Southwestern Bell Telephone Company, 433 F. 2d 421 (5th Cir., 1970) to the case at hand. While I concur that a discriminatory act is not negated by a Respondent's subsequent remedial action, I do not find that any evidence on the record that would establish an inference that the purpose of the Respondent's subsequent discharge of four white employees was in any way connected to the Complainant having filed a discrimination complaint. Further, the most relevant discharge, that of Chris Perry in the Maintenance Department, occurred less than two weeks after the Complainant's discharge and prior to the filing of the discrimination charge in this case. Consequently, I find the subsequent application of the employer's discharge policy both probative and relevant.

5. The treatment of employees in other departments may indeed be probative of whether or not discrimination occurred in a given instance. Under the facts presented here, however, it has been shown that the departments applied the discharge policy autonomously and consistently within a given department, although the policy varied between departments. Therefore, I find under these circumstances the intra-departmental operation of the Maintenance Department of the greatest probative value.

6. Evidence was presented to show that Tom Crow, a white Maintenance Department employee, was consistently tardy and sometimes called in after 11:00 a.m. on a 7:00 a.m. to 3:00 p.m. shift to say he would not be in. Crow, who had been discharged by another of Respondent's departments and later was hired after applying to the Maintenance Department (there is no evidence that the Complainant ever reapplied after his discharge), was not discharged in the Maintenance Department for calling in late or coming to work late.

But there is no evidence other than the Complainant's testimony to show that Crow ever failed to call in on a day that he failed to come to work. The Complainant's testimony is not reliable, however, because the Complainant did not personally know if Crow had called in or not. And although the Complainant claimed he heard about Crow's not calling in from other employees, he did not present any witnesses at the hearing to support his testimony. Further, the substantial deviation of the Complainant's testimony at the hearing and from his testimony at the deposition regarding the circumstances and occurrences on the day he missed work and did not call in also cast a cloud of unreliability on the Complainant's testimony about Crow and other white employees he alleged had violated the same absence - failure to-call-in rule.

The evidence supports the finding that employees who were tardy and/or called in were not terminated in the Maintenance Department, while employees, both white and black (Perry and Jackson) were terminated. While the rule may not make the best business sense, there is no evidence that it was applied discriminatorily.

7. Regarding the sex allegation, the Complainant showed that he was replaced by a female. However, he failed to show pretext and/or lack of credibility of the reason for his discharge. No evidence was presented to show that women in the Maintenance Department ever violated the rule and were not discharged. And the evidence as to the other departments, while less probative, shows that Bookkeeping/Accounting enforced the rule and discharged a female employee while Lisa Huggens in the Kitchen was not. Again, the evidence shows that the rule was enforced consistently within departments, although not consistently between departments.

8. A supervisor in the Kitchen, Millie Weakley, was said by Sengbusch to have a "maternal" attitude toward the employees over which she exercised supervisory authority. Such attitudes, while perhaps benefitting some employees, are often subterfuge for unfair treatment. Under the facts of this case, however, the departments operated autonomously and there was no showing of illegal discrimination.

9. The Respondent apparently completely tolerates tardiness and absence for any reason so long as an employee calls in. However, an "exemplary" and usually on-time employee like Jackson was not even able to miss once without calling in. While the policy was not shown to be discriminatory (the same consequences happened to whites and females), it is a curious and confusing business practice that could be solved by progressive, weighted discipline.

