No. 83-1571
STATE OF WISCONSIN
IN COURT OF APPEALS
DISTRICT IV

STATE ex rel. McDONALD'S RESTAURANT, Petitioner-Respondent v. EQUAL OPPORTUNITIES COMMISSION OF THE CITY OF MADISON, Appellant.	

APPEAL from a judgment of the circuit court for Dane county: RICHARD W. BARDWELL, Judge. Affirmed.

Before Gartzke, P.J., Bablitch, J. and Dykman, J.

BABLITCH, J. The issue is whether the respondent employer, McDonald's Restaurant, unlawfully discriminated against the employee, William Karaffa, in violation of Madison General Ordinance 3.23 when it discharged him for refusing to shave off his beard. The ordinance prohibits an employer from discharging an employee because of his or her physical appearance.[1] "Physical appearance" is defined to encompass hair style and beards, but the ordinance expressly permits employment requirements relating to physical appearance "when such requirement is uniformly applied for admittance to a public accommodation or to employees in, a business establishment for a reasonable business purpose."[2]

McDonald's contended that its concerns for health-safety and a public image of cleanliness constituted reasonable business purposes justifying its "no beard" rule. The appellant Madison Equal Opportunities Commission (MEOC) found that these concerns were pretextual, and issued an order requiring McDonald's to reinstate Karaffa to his job. McDonald's sought review by writ of certiorari. The circuit court reversed the commission, and MEOC appealed. Because we conclude that the undisputed evidence establishes a legitimate health-safety concern, and that this concern constitutes a reasonable business purpose for the rule, we affirm the circuit court. We need not and do not consider whether McDonald's public image concern, to the extent it may be independent of its health safety concern, constitutes a legitimate business purpose under the ordinance.

Our standard of review on appeal is the same as that of the circuit court in reviewing MEOC's determination. On certiorari, the scope of review includes (1) whether the agency acted within its jurisdiction, (2) whether it proceeded on a correct legal theory, (3) whether the action was arbitrary and represented its will rather than its judgment, and (4) "whether the evidence was such that it might reasonably make the order or determination in question." State ex rel. Harris v. Annuity & Pension Board, 87 Wis.2d 646, 651-52, 275 N.W.2d 668, 671 (1979) (quoting Stacy v. Ashland County Dept. of Public Welfare, 39 Wis.2d 595, 600, 159 N.W.2d 630, 633 (1968)). The test for sufficiency of evidence

on certiorari is the substantial evidence test and the question is whether reasonable minds could arrive at the same conclusion as that reached by the agency. Stacy, 39 Wis.2d at 602-03, 159 N.W.2d at 634.

The parties agree that Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), a Title VII sex discrimination case, should govern the appropriate burdens of proof in this case.[3] Under Burdine, the employer has the burden of "articulating" a legitimate nondiscriminatory reason for its allegedly unlawful actions once the employee establishes a prima facie case of discrimination. The employee then has the burden of persuasion that the articulated reason is pretextual. 450 U.S. at 256.

The facts constituting a prima facie case of prohibited discrimination are undisputed. Karaffa was hired as a maintenance worker at one of McDonald's fast food restaurants. His duties included maintenance work in food preparation and eating areas, and occasional food preparation during rush periods about three times per month. An employee handbook provided to him prior to hire contained a rule requiring that employees be clean-shaven. He was discharged after working less than one week for refusing to shave off his beard.

McDonald's introduced expert testimony by a professor of bacteriology from the University of Wisconsin that bearded employees performing Karaffa's job duties increased the risk of food poisoning, primarily by transmission of salmonella organisms. His testimony was based in part on a 1967 scientific study entitled "Microbiological Laboratory Hazard of Bearded Men," which was introduced into evidence.

The expert stated his opinion that the increased risk of food poisoning through a bearded employee was "not insignificant," but said he could not quantify that risk. A beard could function as an agent of transmission, he said, by providing a place for bacteria to reproduce which was harder to clean than a clean-shaven face. Transmission could occur directly when an employee stroked the beard, or through aerosolization when organisms are carried through the environment on air currents. He said that beards would present a greater risk of salmonella contamination than head hair because of their frontal location. Although wearing a cloth mask across the beard might decrease this risk, it would also increase the tendency to perspire and thus might encourage the growth of additional organisms.

Karaffa introduced no evidence which directly countered this testimony. His sole expert witness was a city health inspector, who testified that neither city nor state health regulations prohibited food handlers from wearing beards. The only requirement, he said, was that hair restraints be worn by employees engaged in food preparation.[4]

MEOC's hearing examiner rejected McDonald's health safety concern as a legitimate business purpose justifying the no-beard rule, finding the "increased likelihood of food poisoning argument to be both pretextual and unworthy of credence." He noted that the hats required to be worn by all McDonald's employees did not cover hair that might stick out in the back. He found that Karaffa could have performed his duties safely by washing his beard and wearing a cloth over his face. He recommended that Karaffa be reinstated on condition that he wash his beard and wear a cloth over it while working. MEOC approved the recommended order but deleted the conditions, expressly declining to rule whether any such requirements would be discriminatory.

MEOC contends that the circuit court employed the wrong standard of review in reversing its determination. It notes that the court's duty on review is to search the record to ascertain whether substantial evidence supports the agency's ruling. Such evidence exists, it claims, by virtue of the health examiner's testimony that no state or local law prohibits food handlers or other restaurant employees from wearing beards. We reject the contention.

We find no published caselaw construing the "reasonable business purpose" exception to the prohibition against discrimination on the basis of physical appearance under Madison's ordinance. Such a construction is a question of law, which we review independently on appeal, because it involves the application of the ordinance to the facts. Eastman v. City of Madison, 117 Wis.2d 106, 112, 342 N.W.2d 764, 767 (Ct. App. 1983).

MEOC concedes that the "reasonable business purpose" which would justify a no-beard rule under the ordinance is broader than the business-purpose exceptions embodied in bona fide occupational requirements allowed under statutes prohibiting discrimination based on such factors as age or handicap. Cf. Boynton Cab Co. v. ILHR Department, 96 Wis.2d 396, 291 N.W.2d 850 (1980), construing a statutory exception to the prohibition against handicap discrimination to require an employer to "establish to a reasonable probability" that the handicap rendered employment in the position sought hazardous to the health or safety of the employee, other employees, or frequenters of the place of employment. 96 Wis.2d at 409, 291 NA.2d at 856.[5]

Legislation prohibiting such forms of discrimination is directed towards factors which cannot be changed at will by the object of the discrimination. Madison's prohibition against discrimination based on physical appearance, to the extent that it offers protection for hair styles and beards, is directed toward factors within the control of the individual. This consideration suggests that a broader exception was intended by the legislative body by its use of the term "reasonable business purpose" than the statutory exception justifying discrimination based on handicap.

Preventing the contamination of food to be consumed by restaurant customers is a reasonable business purpose. A rule prohibiting employees who work with food from wearing beards is not an unreasonable means of serving that purpose, in light of evidence that beards increase risk of food contamination. The question is whether the evidence adduced before the commission established such an increased risk. We agree with the trial court's conclusion that McDonald's expert testimony establishing that fact is undisputed in the record.

MEOC's hearing examiner made no finding that the professor's testimony concerning an increased risk of food poisoning was inherently improbable. He gave no reason for finding such a risk "unworthy of credence" except his correlative finding that hats worn by all employees did not cover hair protruding at the back. This ignores the professor's testimony that beards pose a greater risk because of their frontal location on the face.

On appeal MEOC contends that it was entitled to give the testimony of the city health officer greater weight than that of the professor in determining that no increased health hazard exists. The problem with this contention is that the testimony of the two experts was not in conflict. The health officer did not testify that beards posed no increased health hazard. He testified only that no city or state health regulation prohibited beards on food handlers.

The fact that neither the Wisconsin legislature nor the City of Madison has enacted health regulations with respect to bearded restaurant workers does not render the employer's scientific evidence inherently improbable. There is no suggestion in the record that such regulation has ever been proposed in Wisconsin. Even if it had been, legislative inaction respecting such a proposal would not amount to a legislative determination on the merits. Cf. American Motors Corp. v. ILHR Dept., 101 Wis.2d 337, 349, 305 N.W.2d 62, 68 (1981) ("[b]ills frequently fail to attain the stature of laws for reasons that have nothing to do with their merit, but are more related to the time exigencies and other priorities with which the legislature is confronted.") To the contrary, the fact that other states have enacted such regulations is supportive of the expert testimony in this case, and undermines any contention that it was against

reasonable probabilities and could thus be discounted by the commission. See, e.g., EEOC v. Sambo's of Georgia, Inc., 530 F. Supp. 86, 90 (N.D. Ga. 1981).

MEOC also contends that the professor's testimony was inherently improbable because of certain alleged inconsistencies between his testimony and the scientific article introduced into evidence on the study of bearded men in a laboratory setting, and because of the professor's inability to quantify the increased risk to which he testified. We reject these contentions as well.

There is no suggestion in the record that the article in question was the sole basis of the professor's expert opinion. Any alleged inconsistencies between the article and his opinion, which we find it unnecessary to detail here, are immaterial to the question before us. The study reported in the article, was a narrow, highly technical, test which questioned whether bearded men who worked in laboratories posed a special threat of infecting others. The article concluded that it did, under certain circumstances, because the beards are more resistant to cleansing than clean-shaven faces. This conclusion supports the opinion of the professor, who had worked in the area of food poisoning for twenty-five years, was in charge of two laboratories, and had published some eighty-five scientific articles of his own.

The professor's failure to quantify the increased risk to which he testified offers no basis for the finding that McDonald's announced reason for its rule was pretextual. The question for determination was not the size of the risk, but rather whether the employer had a legitimate business purpose for its rule or was instead manufacturing an excuse for illegal discrimination.

The record not only contains no substantial evidence, but is devoid of any evidence supporting MEOC's finding that McDonald's concern for health-safety--concededly a legitimate business purpose on its face--was a pretextual reason for its nationwide no-beard rule. The circuit court properly vacated MEOC's order.

By the Court.--Judgment affirmed.

Inclusion in the official reports is not recommended.

APPENDIX

[1]Madison General Ordinance sec. 3.23(7) provides in relevant part:

> It shall be an unfair discrimination practice and unlawful and hereby prohibited: For any . . . employer . . . to discharge any individual . . . because of such individual's . . . physical appearance . . .

[2]Madison General Ordinance sec. 3.23(2)(k) provides:

> "Physical appearance" means the outward appearance of any person, irrespective of sex, with regard to hair style, beards, manner of dress, weight, height, facial features, or other aspects of appearance. It shall not relate, however, to the requirement of cleanliness, uniform, or prescribed attire, if and when such requirement is uniformly applied . . . to employees in a business establishment for a reasonable business purpose.

[3]No published opinion in Wisconsin addresses the question of the applicable burdens of proof in an employment discrimination action brought under a municipal ordinance, or the meaning of "reasonable business purpose" under Madison General Ordinance 3.23. The Wisconsin Supreme Court has looked to federal decisions allowing analogous affirmative defenses in applying the state fair employment law. Bucyrus-Erie Co. v. ILHR Department, 90 Wis.2d 408, 421 n. 6, 280 N.W.2d 142, 149 (1979). MEOC's hearing examiner employed the Burdine analysis in evaluating the evidence, and we find

no reason to depart from it.

[4]Former Wis. Admin. Code, sec. H 96.08(3)(b) is now sec. HSS 196.08(3)(b). It provides:

> Effective hair restraints, such as hair nets or caps, shall be used by food-preparation personnel. Hair sprays and head bands are not acceptable hair restraints. Effective hair control to eliminate unnecessary touching or handling of hair shall be practiced by waitresses and other restaurant employees.

[5]Because of the high duty owed to the public by the employer, a common carrier, Boynton applied a relaxed version of the "reasonable probability" test to the facts of that case which required the employer to show that its rule restricting employment of one-armed persons was "rational and reasonably tailored" to promote safety. 96 Wis.2d at 415, 291 N.W.2d at 859.

STATE OF WISCONSIN
CIRCUIT COURT
DANE COUNTY

WILLIAM KARAFFA, Petitioner, vs. EQUAL OPPORTUNITY COMMISSION, Respondent	DECISION & ORDER Case No. 82-CV-2500
STATE ex rel, MC DONALD'S RESTAURANT, Petitioner, vs. EQUAL OPPORTUNITIES COMMISSION OF THE CITY OF MADISON, Respondent,	Case No. 82-CV-2423

BEFORE HON. RICHARD W. BARDWELL, CIRCUIT JUDGE, BRANCH #1

These consolidated cases are before the court for review by writ of certiorari. The City of Madison Equal Opportunity Commission (hereafter commission or MEOC) determined in a decision dated 15 April 1982 that Petitioner McDonald's Restaurant had discriminated against Respondent William Karaffa because he wore a beard, thus violating sec. 3.23 Madison General Ordinances. Although counsel present the court with a barrage of issues, we deem the following, with their sub-issues, to be dispositive and worthy of discussion: 1) whether sec. 3.23 Madison General Ordinances was unconstitutional, contradicting sec. 111.3. et. seq. Wis. Stats. and improperly addressing issues which were preempted by the state; and 2) whether the commission erred in finding that McDonald's did not have a reasonable business purpose for denying employment to Karaffa.

The record reveals the following uncontroverted facts. William Karrafa was employed as an "outside porter" at Petitioner's restaurant on 12 January 1981. His duties included general clean up and maintenance jobs throughout the restaurant, including the areas where food was prepared. Further, a McDonald's representative testified that at very busy times Karaffa would be pulled from his janitorial duties to assist in the actual preparation of food. Mr. Karaffa wore a beard prior to and during his employment with Petitioner, notwithstanding the latter's rule that employees be clean shaven. Petitioner terminated Mr. Karaffa's employment on 18 January 1981, by Petitioner's own admission because Karaffa refused to shave his beard. Mr. Karaffa subsequently filed a complaint with the MEOC, from whose decision Petitioner here appeals.

The scope of review on certiorari is limited to asking: (1) whether the MEOC kept within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question. State ex rel. Ruthenberg v. Annuity and Pension Board, 89 Wis. 2d 463, 472, 278 N.W.2d 835 (1979). Noted former Chief Justice Hallows, "the test on certiorari for sufficiency of the evidence is the substantial evidence test." Stacy v. Ashland County Department of Public Welfare, 39 Wis. 2d 595, 602, 159 N.W.2d 630 (1968).

I. THE ENFORCEABILITY OF SEC. 3.23(7)(a) MADISON GENERAL ORDINANCES.

Sec. 3.23(7)(a) Madison General Ordinances provides in relevant part:

> It shall be an unfair discrimination practice and unlawful and hereby prohibited: For . . . any . . . employer . . . to discharge any individual . . . because of such individual's . . . physical appearance . . .

Sec. 3.23(2)(k) Madison General Ordinances defines "physical appearance":.

> . . . the outward appearance of any person, irrespective of sex, with regard to hair style, beards, manner of dress, weight, height, facial features, or other aspects of appearance. It shall not relate, however, to the requirement of cleanliness, uniforms, or prescribed attire, if and when such requirement is uniformly applied for admittance to a public accommodation or to employees in a business establishment for a reasonable business purpose.

Sec. 111.31 Wis. Stats. (1979) makes the regulation of employment: discrimination a matter of statewide concern. But municipalities may still regulate such areas pursuant to sec. 62.11(5) Stats. (the Home Rule statute) unless one of the following is true:

a. express statutory language revokes or withdraws such municipal power;

b. the ordinance in question infringes upon the spirit of state law or general policy of the state;

c. the ordinance is logically inconsistent with state legislation. Madison Association of Food Dealers v. City of Madison, 97 Wis.2d 426, 432-33, 293 N.W. 2d 540 (1980).

Petitioner charges that sec. 3.23 Madison General Ordinances is logically inconsistent with and offends the spirit of sec. 103.14 Stats., which compels employers to notify employees at the time of hiring of any appearance requirements. Petitioner asserts that an ordinance which prohibits discrimination contradicts this statute which impliedly permits such discrimination in the form of appearance rules. We disagree with Petitioner's reasoning.

We see no contradiction between sec. 3.23 Madison General Ordinances and sec. 103.14 Wis. Stats. Nor must we here decide whether sec. 103.14 Wis. Stats. shall be given retroactive effect. Even if it were, the statute would not be offended by Ordinance 3.23. A careful reading reveals that both laws permit employment decisions to be based on an employee's appearance in the proper circumstances. The ordinance defines those circumstances; the statute does not. The absence of such definition in the statute cannot be held to ban ordinances which forbid the wrongful use of physical appearance criteria in hiring. We need not, therefore, determine that the statute preempts the ordinance; they can comfortably co-exist.

II. THE REASONABLE BUSINESS PURPOSE DEFENSE.

In its final order., the commission declared that Mr. Karaffa had been discriminated against on the basis of his physical appearance in violation of sec. 3.23 Madison General Ordinances. McDonald's argued that it had essentially two "reasonable business purposes" (per sec. 3.23 Madison General Ordinances) for its no beard rule: (1) the clean cut image that McDonald's projected was itself a valid reason for prohibiting beards on its employees; and (2) bearded men working near food heighten the chance of food poisoning.

The U.S. Supreme Court has delineated the parties' respective burdens of proof in discrimination litigation. Tax Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53, 101 S. Ct. 1089, 67 L.Ed.2d 207 (1981). Plaintiff has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. If plaintiff succeeds in proving a prima facie case, the burden shifts to the defendant to "articulate" an acceptable, non-discriminatory reason for its actions (in the instant case, the burden was upon McDonald's to articulate a reasonable purpose for its no beard rule). Note that the Defendant's burden is not to "prove" the asserted reasons, but merely to articulate them. Then, plaintiff is given an opportunity to prove by a preponderance of the evidence that defendant's reasons are not true but are merely a pretext for discrimination. Id. cf. Boyd v. Madison County Mutual Insurance Co., 653 F.2d 1173 (C.A.7th Cir. 1981).

In its brief of 22 November 1982, the City Attorney's office pressed this court to employ the Burdine analysis. We do so, finding significant congruity between the Title VII "non-discrimination" exception and the Madison General Ordinance "reasonable business purpose" exception.

In light of the foregoing, we consider Petitioner's contentions seriatim.

a. Public Image as a Reasonable Business Purpose

There is a wealth of analogous caselaw which upholds employment grooming standards against Title VII challenges. See Brown v. D.C. Transit System, Inc., 523 F.2d 725 (D.C. Cir. 1975); Willingham v. Macon Telegraph Publishing Co., 507 F. 2d 1984 (5th Cir. 1975) ; Baker v. California Land Title Co., 507 F.2d 895 (9th Cir. 1974). More specifically, courts have upheld no beard rules when they exist for reasonable business purposes, such as public image or considerations of public health. Woods v. Safeway Stores, Inc., 420 F.Supp. 35 (E.D. Va. 1975), aff'd 579 F.2d 43 (4th Cir. 1978), cert. den. 440 U.S. 930 (1978), and EEOC v. Sambo's Restaurant, 27 FEP Cases 1210, 1213 (D. Ga. 1981). Noted the court in Woods:

> . . . the business involved is the retail food business, a highly competitive multi-denominational industry. Since the product sold is intended, for the most part to be consumed, overall store hygiene and an appearance of cleanliness is an important aspect of customer preference. It was the judgment of the Safeway management . . . that a grooming code, maintaining an image of cleanliness was necessary . . . . The Defendant, exercising

> sound business judgment, concluded that a "no beard" rule was a necessary part of its grooming code. 420 F. Supp. at 43.

In the case before us, Roger Knott, a McDonald's Field Marketing Manager testified that McDonald's tried to market an image of cleanliness. (Transcript, p. 129). He cited examples of advertising efforts designed to convey that image. The MEOC, in its decision, declared public image to be a pretextual issue, dismissing it in one sentence:

> . . . the public image argument must be rejected in that it is the Respondent's [McDonald's] own testimony that Captain Crook, a mythical character in fantasy land is a bearded character identified with the Restaurant's image. (p. 5 of the adopted Recommended Findings)

Applying the Burdine test (supra) in conjunction with the above caselaw, it is clear that McDonald's did articulate reasonable business purpose for its no beard rule. The commission irresponsibly and without a preponderance of rebutting evidence, dismissed the weighty argument that McDonald's image centers on cleanliness and that that image is enhanced by clean shaven employees. Surely, ads portraying a mustachioed mythical sea captain in a fanciful land do not undermine the clean cut McDonald's image. There is no evidence on record that Captain Crook is employed as a McDonald's waiter or that he is in any way connected with the restaurant's serious image; he merely frequents the restaurant as a customer with his imaginary companions. To assert that the Crook character belies the sincerity of McDonald's concern with a clean image is simply absurd and deserves no more of our attention. Complainant Karaffa failed to rebut by a preponderance of the evidence Petitioner's articulated reasonable business purpose. The commission erred, acting arbitrarily and unreasonably, in failing to so find.

b. Public Health as a Reasonable Purpose.

Sec. HSS 196.07(2) Wis. Adm. Code compels restaurants to protect food and equipment from contamination. Sec. HSS 196.08(3)(b) Wis. Adm. Code requires employees in restaurant settings to maintain effective hair control. Sec. 50.55 Wis. Stats. (1975) declares that "every . . . restaurant . . . shall be operated and maintained with a strict regard to the public health and safety . . ." Clearly, the law establishes public health as a reasonable business purpose for acting.

The issue before this court, then, again applying the Burdine and Ruthenberg tests (supra), is whether the commission was reasonable in finding that McDonald's articulated defense had been rebutted by a preponderance of the evidence. Doctor Robert Deibel, professor of bacteriology at, the University of Wisconsin, Madison, testified before the commission that a bearded employee would increase the risk of food poisoning in Petitioner's restaurant. (Transcript, p. 96). That testimony stands unrefuted. Moreover, common sense dictates that the risk of food poisoning would be even greater where, as here, the bearded employee will from time to time be involved in actual food preparation. The commission still found "the increased likelihood of food poisoning argument to be both pretextual and unworthy of credence." (p. 5 of the adopted Recommended Findings).

The Wisconsin State Supreme Court held in McNally v. Tollander, 97 Wis. 2d 583, 606-07, 294 N.W.2d 660 (1980):

> While questions of sufficiency and weight of expert evidence are for the factfinder to determine (cites omitted), a court cannot ignore positive uncontradicted testimony in the absence of something which discredits it or renders it against reasonable probability.

MEOC cited two grounds allegedly discrediting the doctor's testimony or rendering it against reasonable probability: (1) the bald assertion (to which the doctor took exception, see Transcript, pp. 117, 118) that Karaffa could have safely performed his duties with a beard; and (2) the finding that present McDonald's employee hats do not cover all of the wearer's hair. (p. 5 of the adopted Recommended Findings). The commission here committed an error of law; neither of its grounds discredits the expert's testimony or renders it against reasonable probability. The MEOC would seem to be beyond its authority when it, without support, contradicts the opinions of known experts in bacteriology. Further, Doctor Deibel explained in his testimony that beards are more susceptible to spreading food poisoning than are side and back head hairs, but the MEOC arbitrarily disregards that scientific opinion, basing its decision in part on the failure of McDonald's hats to cover the entire head. Such errors of law are always reviewable by reviewing courts. Pabst v. Department of Taxation, 19 Wis. 2d. 313, 322, 120 N.W.2d 77 (1963).

Counsel argue at length over a scientific study upon which Dr. Deibel based his testimony. Such argument is wasted. The doctor, being an expert, was qualified to use the study, coupled with his background knowledge, and draw conclusions based on both. At issue here is not the reliability of the study, but the propriety of the doctor's testimony, based as it was upon the totality of his knowledge. That testimony remains unrefuted on the record and was arbitrarily rejected by the MEOC.

This court does not imply by its decision that McDonald's or any other restaurant has carte blanche to enforce whatever employment rules are best for business, notwithstanding the impact on employees' personal liberty. Rather, we are very solicitous of the rights of individuals to conduct their lives unimpeded by unnecessary and arbitrary regulations. But where a reasonable purpose underlies otherwise discriminatory acts, the law and our concern for social order and public safety compel us to uphold those acts.

Accordingly, it is ORDERED than the Madison Equal Opportunity Commission is reversed. Counsel for Petitioner McDonald's is to prepare the appropriate judgment reversing the ruling of the MEOC without costs. A copy of the proposed judgment should be submitted to other counsel before submission to the court for signature.

Dated July 6, 1983.

BY THE COURT:

Richard W. Bardwell
Circuit Judge

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

William Karaffa 218 Merry Street Madison, WI 53704 Complainant	FINAL ORDER

vs. McDonald's Restaurant 4687 Verona Road Madison, WI 53711 Respondent	Case No. 2752

The Hearing Examiner of the Madison Equal Opportunities Commission (MEOC) issued the Recommended Findings of Fact, Conclusions of Law and Order on November 2, 1981. Timely exceptions were filed by both parties, written arguments were submitted, and oral arguments were heard by twelve Commissioners on March 26, 1982.

Based upon a review of the record in its entirety, the MEOC issues the following:

ORDER

That the attached Recommended Findings of Fact, Conclusions of Law and Order (hereinafter, "Examiner's Decision") is AFFIRMED in its entirety, except as follows:

(A) The phrase in the parentheses beginning on the second line of the second last paragraph on page 5 of the Examiner's Decision is hereby DELETED;

(B) The sentence beginning with the last word on page 5 of the Examiner's Decision, "The Respondent could have required the Complainant to wash his beard and use a cloth over it, . . ." is hereby DELETED; and

(C) The phrase in the parentheses on the fourth line of page 6 of the Examiner's Decision is hereby DELETED.

Commissioners Abramson, Amato, Galanter, Goldstein, Hall, Hisgen, Lee, Mendez, Swamp, Thome and Ware all join in affirming the Examiner's Decision as modified above. Commissioner Smith dissented.

OPINION

A. Conditions of Employment or Reinstatement

The Commission agrees with the reasoning of the Examiner except that the Commission has deleted the parenthetical phrase on page 5, the sentence on page 5 and 6 of the Memorandum Opinion stating that "The Respondent could have required the Complainant to wash his beard and use a cloth over it . . ." as a condition of employment, and the phrase in the parentheses on page 6 of the Memorandum Opinion implying that the Order requires beard-washing and the use of a cloth while working as mandatory conditions of the Complainant's reinstatement.

The main liability issue at hand is whether or not it was discriminatory to have discharged the Complainant under Section 3.23 of the Madison General Ordinances. The Commission, while finding the discharge discriminatory, declines to rule on whether other actions taken by the Respondent short of discharge (such as requiring the wearing of a cloth or beard-washing) would have been discriminatory or would be discriminatory after the Complainant is reinstated.

B. Remedy

The Commission, in affirming the portion of the Examiner's Order denying backpay to the Complainant from the time of the discharge to the time of hearing (actually, to the time of the issuance of the Examiner's Decision) finds that the Respondent adequately carried its heavy burden[1] of proving that the Complainant did not use reasonable (or due) diligence in seeking to mitigate his losses during that time period. Front pay, however, shall be awarded from the date of the Examiner's Decision, November 2, 1981, until the time the Complainant is reinstated as required by Recommended Order #3 (adopted as part of the Commission's FINAL ORDER). The Respondent's argument that front pay should not be awarded until all possible appeal rights have been exhausted[2] (including all appeals into the courts) is hereby rejected.

Signed and dated this 15th day of April, 1982.

EQUAL OPPORTUNITIES COMMISSION

A. Gridley Hall
EOC President

cc: Attorney James Hublou
Attorney James Scott

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[1]State ex rel Schilling and Klingler v. Baird, 65 Wis.2d 394 (1974) and EEOC v. Kallir, Phillips, Ross, Inc., 13 FEP Cases 1508, 1512 (1976).While the burden on the Respondent is heavy to demonstrate that the Complainant did not use reasonable diligence to mitigate damages, the Complainant's evasive responses to the Respondent's questions at hearing was probative that the Complainant had, in fact, not exercised reasonable diligence in seeking other employment.

[2]The Respondent argues that the front pay order discourages the Respondent from pursuing its appeal rights in this matter. Whether the Respondent's (or Complainant's) appeal rights are encouraged or discouraged, however, is a matter not germane to the entry of an appropriate Order in this ease.

What is essential is that:

> If after hearing, the Commission finds that the respondent has engaged in discrimination, it shall make written findings and order such action by the respondent as will redress the injury done to complainant, bring respondent into compliance with its provisions and generally effectuate the purpose of this ordinance. (See first sentence of Section 3.23(9)2.b, Madison General Ordinances.) (Emphasis added)

Part of the Complainant's injury is a loss of wages. In this case, that loss is an ongoing loss from the time of the discharge to the time he is reinstated, less ordinance setoffs. While the Respondent has successfully showed that the Complainant is not entitled to "backpay" from the time of the discharge to the time of the hearing, the amount of "front pay" which the Complainant is entitled to (if any) has yet to be fixed. Should the Respondent choose to appeal the Commission Order, and ultimately fail (i.e., the Commission Order is upheld), the present Order will redress the injury done to Complainant. The Order which the Respondent suggests would not redress that injury, however. The Respondent, of course, would and should have an opportunity to show whether and to what extent the Complainant has mitigated damages from November 2, 1981 forward to the time of reinstatement (see State ex rel Schilling, supra) if a dispute on that issue remains after all appeals have been exhausted.

CITY OF MADISON
210 MONONA AVENUE
MADISON, WISCONSIN

William Karaffa 218 Merry Street Madison, WI 53704 Complainant vs. McDonald's Restaurant 4687 Verona Road Madison, WI 53711 Respondent	RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 2752

A complaint was filed with the Madison Equal Opportunities Commission on January 26, 1981 alleging discrimination on the basis of physical appearance in regard to employment. Said complaint was investigated by Human Relations Investigator Mary Pierce and an Initial Determination dated March 10, 1981 was issued finding Probable Cause to believe that discrimination had occurred as alleged (specifically, that there was probable cause to believe that the Complainant had been discriminated against because he wore a beard).

Conciliation was waived and/or failed, and the matter was certified to public hearing. A hearing was held on August 10, 1981. Attorney James T. Hublou of ARMSTRONG LAW OFFICES, LTD. appeared on behalf of the Complainant, who also appeared in person. Attorney James R. Scott of LINDNER, HONZIK, MARSACK, HAYMAN AND WALSH, S.C. (Milwaukee, Wisconsin) represented the Respondent.

Based upon the record 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, William Karaffa, is an adult male residing in the State of Wisconsin.

2. The Respondent, McDonald's Restaurant, is a restaurant doing business at 4687 Verona Road in the City of Madison, State of Wisconsin.

3. The Complainant was hired by the Respondent as an outside porter. The Complainant commenced employment on or about January 12, 1981 and earned Five Dollars ($5.00) per hour. In his first and only five days of employment, the Complainant grossed $211.23 and netted $166.38.

4. On or about the third day of employment, the Respondent advised the Complainant to shave off his beard as a condition of his continued employment. The Complainant had the subject beard at the time he was interviewed and hired for the employment that commenced on January 12, 1981.

5. As a result of the Complainant's refusal to shave his beard as requested, his employment was

terminated on January 16, 1981.

6. At the time of the Complainant's hire, the Respondent had an "F" rating for cleanliness at the 4687 Verona Road store, the lowest rating (on an A, B, C, D, F rating scale) that a store could have in the franchise system with which Respondent was associated.

7. The Complainant could have worked without causing any increased risk of food poisoning at Respondent's store if the following two conditions were met:
a. The Complainant washed his beard prior to each workshift; and
b. The Complainant wore a cloth over his beard.

8. The Respondent would not be in violation of any City or State health code had the Complainant worn a hair net (See Complainant's Exhibit 2) while working as an outside porter.

9. The Complainant had received a copy of the Respondent's employee handbook prior to commencing his employment. Said employee handbook required that all employees be "clean shaven".

10. Subsequent to the Complainant's discharge, his duties were performed by a non-bearded employee (s).

11. The Complainant's duties consisted primarily of inside and outside maintenance tasks on a 5:00 a.m. to 1:00 p.m. (or thereabout) shift. He would have had to help with food preparation on an average of about three (3) occasions per month during unanticipated rushes at the restaurant, especially during football season and in the summers.

12. Employees were required to wear hats, but these hats did not cover all of the hair on their head, including hair sticking out the back.

13. The Complainant did not actively seek other employment from the time of his discharge up to the time of this hearing on August 10, 1981.

RECOMMENDED CONCLUSIONS OF LAW

1. The Complainant is a member of the protected class of physical appearance 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 was discriminated against on the basis of his physical appearance (beard) in regard to discharge from employment in violation of Section 3.23, Madison General Ordinances.

4. The Complainant did not use reasonable diligence within the meaning of Section 3.23(a)(c)2.b., Madison General Ordinances, to seek employment from the tine of his discharge up to the time of the hearing.

RECOMMENDED ORDER

1. That the Respondent cease and desist from discriminating against the Complainant on the basis of his physical appearance (beard) in regard to employment.

2. That the Complainant be reinstated into the next available position as an outside porter or other available position for which the Complainant is qualified.

3. That the Complainant receive front pay less ordinance setoffs from the date this Recommended Findings of Fact, Conclusions of Law and Order are issued until the time he is reinstated. The Complainant shall not, however, be entitled to any backpay.

4. That the Complainant receive all seniority that he would be entitled to had he not been discharged.

MEMORANDUM OPTION

There is essentially no dispute to the following facts:

(1) The Complainant had a beard at the time of his hire by the Respondent as an outside porter;

(2) The Complainant was qualified to perform the outside porter duties and was performing those duties adequately, at the time of discharge;

(3) The Complainant was discharged solely because he had a beard;

(4) The discharge was pursuant to a company policy that all employees must be "clean shaven", and that policy appeared in an employee handbook which the Complainant received prior to the time of his hire; and

(5) The Complainant's duties, subsequent to his discharge, were assigned to non-bearded employees.

I. PRIMA FACIE CASE

The Complainant established a prima facie case of discrimination under the ordinance.[1] The Respondent then articulated essentially the following reasons for the Complainant's discharge:[2]

1. Beards are not protected in this situation under Section 3.23, Madison General Ordinances in light of the definition in Section 3.23(2)(k):

> "Physical appearance" means the outward appearance of any person, irrespective of sex, with regard to hair style, beards, manner of dress, weight, height, facial features, or other aspects of appearance. It shall not relate, however, to the requirement of cleanliness, uniforms, or prescribed attire if and when such requirement is uniformly applied . . . to employees in a business establishment for a reasonable business purpose." (Emphasis added)

a. Bearded employees increased the risk of food poisoning occurring at the restaurant; consequently, the Respondent did not permit employees to wear beards to eliminate that increased risk and the potential human safety and business harm arising from that risk.

b. The no-beard requirement is related to the public image of the restaurant and could be considered as part of the uniform or prescribed attire (thus, falling within the exception).

II. REASONABLE BUSINESS PURPOSE VERSUS PRETEXT

The Respondent presented an expert witness, Dr. Robert Deibel, a Bacteriology professor at the University of Wisconsin, whose testimony may be summarized as follows:

> There is a 1967 study (see Respondent's Exhibit 5) which is essentially the state of the present knowledge regarding the relationship of beards to food poisoning. By spraying certain organisms on the beards of some men and measuring the beard fallout (by the process of aerosolization) on petri dishes, the study found that bearded persons increase the likelihood of spreading all three main types of food poisoning. Accordingly, the likelihood of food poisoning actually occurring is increased. The study also showed that washing a beard diminishes the increased risk but does not eliminate it. In addition to aerosolization, Deibel identified and explained how the stroking of a beard might also transmit food poisoning.

Deibel further testified that while the likelihood of food poisoning occurring is increased, it has not been quantified; i.e., he did not know how great or small an increased risk. He said that the increased risk would be substantially reduced by a combination of beardwashing and the wearing of a cloth over the beard.[3] I consider Deibel's testimony to the effect that sweat caused by use of the cloth may again increase the risk as purely speculative, albeit an expert's speculation. Further, Area Supervisor Kasten testified that the outside porter would work directly with food and/or the public on an average of no more than three times per month, and that would occur during unanticipated "rushes" that usually occurred when bus loads of persons would, arrive unannounced at the restaurant and all available employees were used on food production to handle the rush.

Finding that the Complainant could have performed his duties safely without being discharged (by washing the beard and wearing a cloth) and finding that the hats required to be worn by employees did not cover the hair that might stick out the back, I find the increased likelihood of food poisoning argument to be both pretextual and unworthy of credence.[4]

Also, the public image argument must be rejected in that it is the Respondent's own testimony that Captain Crook, a mythical character in a fantasy land, is a bearded character identified with the Restaurant's image. Consequently, all of the reasons advanced by the Respondent are shown to be pretextual and/or unworthy of credence.[5]

I also find the discharge to be inconsistent with the purposes of Section 3.23, Madison General Ordinances which states that "Denial of equal opportunity in employment deprives the community of the fullest productive capacity of those of its members so discriminated against and denies to them the sufficiency of earnings necessary to maintain the standards of living consistent with their abilities and talents." The Respondent could have required the Complainant to wash his beard and use a cloth over it, but to discharge him was discriminatory.

Consequently, I have entered an order requiring reinstatement (under the conditions of beard-washing and the use of a cloth while working). However, the evidence on the record requires preclusion of a backpay award in that the Complainant has not shown reasonable or due diligence in seeking employment since his discharge by the Respondent.

> Signed and dated this 2nd day of November, 1981.

Allen T. Lawent
Hearing Examiner

FOOTNOTES

[1]This is true using either an analysis of Flowers v. Crouch Walker, 552 F.2d 1277, 14 EPD 7510, or Boynton Cab v. DILHR, 25 EPD 30.925 (1980). Flowers requires that the Complainant show: 1) he is a member of the protected class, 2) he was qualified for the job he was performing; 3) he was satisfying the normal requirements of his work; 4) he was discharged; and 5) he was replaced by persons outside the protected class. Boynton requires that the Complainant must show s/he comes within the physical appearance provision of the ordinance and that the employer's discrimination was on the basis of physical appearance.

[2]The Complainant, in his brief, argues for application of the "business necessity" test outlined in Griggs v. Duke Power, 401 U.S. 424 (1971) and Robinson v. Lorillard Corp., 444 F.2d 791 (1971). Those cases are not applicable here as they are disparate impact cases, not cases dealing with an individual complaint of discrimination. In a disparate treatment case, the Respondent need only articulate legitimate, non-discriminatory reasons for an employment action adverse to an employee. The burden is on the Complainant to show these reasons are pretextual or unworthy of credence. (See Texas Department of Community Affairs v. Burdine, 25 EPD par. 31,544.)

This is true even under a Boynton analysis (see Footnote 1 above). Once the first two elements are established by the Complainant by a preponderance of the evidence (the two elements are recited in Footnote 1), it must appear the employer cannot justify its alleged discrimination under the ordinance exception. While State courts seem to have imposed a heavier burden of proof on the Respondent in handicap cases, I hold that the burden of proof in physical appearance cases under the Madison ordinance is the same as that stated in Burdine. Essentially, the employer need only articulate a legitimate, non discriminatory reason(s) for the discharge and/or articulate a reasonable business purpose(s) within the meaning of the Section 3.23(2)(k) exception. The burden is then on the Complainant to show by a preponderance of the evidence that the articulated reasons or purposes are pretextual or unworthy of credence; i.e., in Boynton language, the Complainant must prove by a preponderance of the evidence that the employer cannot justify its alleged discrimination under the ordinance exception or by any other legitimate, non-discriminatory reasons.

[3]Testimony from James Mason, a City Health Inspector for over 20 years, indicates that a hair net would be legally acceptable. However, the Respondent's expert witness insists that a hair net is insufficient and a cloth would be necessary.

[4]See Board of Trustees v. Sweeney, 439 U.S. 24, 18 EPD 8673.

[5]Same as Footnote 4.