

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

<p>Jerome Harper 1706 Northport Drive, #4 Madison, WI 53704</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Open Pantry Food Marts 437 West Gorham Street Madison, WI 53703</p> <p style="text-align: center;">Respondent</p>	<p>FINAL ORDER</p> <p>Case No. 2771</p>
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The Examiner issued the Recommended Findings of Fact, Conclusions of Law and Order (hereinafter, "Recommended Decision") on April 13, 1982. The Complainant filed a timely appeal, and pursuant to MEOC Rules 10 and 15.52, a review of the appeal was made by ten (10) members of the Madison Equal Opportunities Commission (MEOC). Based upon a review of the record in its entirety, including the written arguments submitted by the parties, the MEOC enters the following:

ORDER

That the attached Examiner's Recommended Decision dated April 13, 1982 be and hereby is affirmed in its entirety and shall stand as the FINAL ORDER herein.

Commissioners Abramson, Amato, Fineman, Galanter, Kifle, Mendez, Swamp and Ware all join in affirming the Examiner's Recommended Decision and entering the FINAL ORDER as recited above. Commissioners Cobb and Cox dissented.

Signed and dated this 31st day of August, 1982.

EQUAL OPPORTUNITIES COMMISSION
Betsy Abramson
EOC President

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Respondent	
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A complaint was filed on February 17, 1981 with the Madison Equal Opportunities Commission (MEOC) alleging discrimination on the basis of race in regard to employment. Said complaint was investigated by MEOC Human Relations Investigator Renee Payne and an Initial Determination dated August 27, 1982 was issued finding probable cause to believe that discrimination had occurred as alleged.

Conciliation failed and/or was waived, the matter was certified to public hearing on September 14, 1981 and a hearing was held beginning on February 16, 1982. Attorney Diane Remeika of JULIAN AND OLSON, S.C. appeared on behalf of the Complainant who also appeared in person. Employee representatives Charles MacIntyre and Jerry Swanson appeared for the Respondent. Based upon the record of hearing and after consideration of the post hearing written arguments 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 is a black male residing in the State of Wisconsin.
2. The Respondent, Open Pantry Food Marts of Wisconsin, Inc., is a corporation doing business in and employing persons in the City of Madison.
3. The Complainant began employment as a part time clerk for the Respondent on January 25, 1981 at Respondent's store located at 437 West Gorham Street in the City of Madison, State of Wisconsin.
4. The duties of a part time clerk included cashiering, slicing meats in the delicatessen, stocking, pricing, shelving items, and so on.
5. The Complainant worked five shifts prior to being terminated by the Respondent:
 - a. January 25, 1981 from 10:00 a.m. to 2:00 p.m. Training
 - b. January 27, 1981 from 12:00 a.m. to 6:00 a.m. Training
 - c. January 28, 1981 from 10:00 p.m. to 6:00 a.m.
 - d. February 4, 1981 from 12:00 a.m. to 6:00 a.m.
 - e. February 8, 1981 from 11:00 p.m. to 6:00 a. m.
6. The Complainant was terminated on or about February 13, 1981 due to his poor performance at work, slow work speed and lack of enthusiasm to work.
7. The Complainant was terminated by Respondent's store manager, Jerry Swanson.
8. Swanson, at the time, supervised employees at the store where the Complainant worked. Swanson presently is a zone manager for Respondent.
9. Respondent's employees discharged at Swanson's direction within thirty (30) days of the date of their hire were:
 - a. Dave Bale
 - b. Keith Brandstetter
 - c. Harold Dioudennie
 - d. Jerome Harper, the Complainant
 - e. Lurlie Perry
10. Bale and Brandstetter are white; Dioudennie, the Complainant and Perry are black.
11. Bale and Brandstetter were both terminated for "no show at work"; i.e., as a result of the combined failure to appear and to call in to say that the employee was not coming to work.
12. Perry was terminated for the same reason as Bale and Brandsetter. Dioudennie was terminated for "slow work".
13. Wayne Everson, a white employee for the Respondent, was terminated after either 7 or 38 days of work; the evidence presented indicated he was terminated on either January 24, 1981 (the day before the Complainant started work) or on February 24, 1981 (about two weeks after the Complainant was terminated). Everson was terminated at Swanson's direction for "slow work".
14. At the time the Complainant was employed, the Respondent had no policies regarding probationary periods for employees. Sometime subsequent to the Complainant's termination, the Respondent initiated a practice of extending to new employees, a thirty (30) day probationary period with some

exceptions, such as failure to show and failure to call in to work (which still results in immediate termination, according to Respondent's policy).

15. The Complainant, among other work problems, had trouble estimating the weight of items and using the meat slicer, stocked the cooler slowly and incorrectly after telling the night manager (Brian Mickelson) that he knew how to do it, failed to come out of the cooler to assist the cashier when the cashier line exceeded five people, failed to clean a floor properly (did not sweep it thoroughly before mopping) and refused to clean the bathroom. All clerks were required to and performed each of these duties.
16. Harper had received more training at the onset of his employment than most employees, having been trained for 10 hours as opposed to the usual 8 hours. Harper's training periods included sessions with Swanson and Mickelson.
17. Rodney Lewis, the only other black employee at the 437 West Gorham Street store at the time the Complainant was employed, was terminated after approximately 3 months of employment for failure to follow proper cash register procedures resulting in a ten dollar shortage on one occasion. Lewis had been previously warned of the cash register operation problems prior to his termination. Lewis had also refused to clean bathrooms but was not terminated for that reason.
18. The Complainant failed to satisfactorily perform the duties of the clerk job.

RECOMMENDED CONCLUSIONS OF LAW

1. The complainant is a member of the protected class of race 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 not discriminated against by the Respondent on the basis of his race in regard to discharge from employment, within the meaning of Section 3.23 Madison General Ordinances.

RECOMMENDED ORDER

That this case be and hereby is dismissed.

MEMORANDUM OPINION

The evidence is rather strong that the Complainant was unable to satisfactorily perform the duties of job. Despite having received slightly more training than most new clerks on his initial shifts, he was a slow worker, he insisted he could do tasks that he did not later perform properly (stocking the cooler), he was resistant to learning how to do or performing tasks that other employees were required to perform (slicing and weighing meat, cleaning the bathrooms), and so on.

At the time of the Complainant's discharge, the Respondent had no policy regarding a probationary period of thirty (30) days (a policy instituted later). Both white employees and black employees had been discharged at Swanson's direction before thirty days of employment had expired. Two of the white employees had been discharged for "no call, no show" violations as had one black employee. Two black employees (including the Complainant) and one white employee had been discharged for slow work .

There is a dispute as to whether Everson (the white employee discharged for slow work) was actually discharged after 7 or 38 days of employment. However, Everson was discharged within about two or three weeks maximum of the Complainant's discharge (either before or after). In the absence of a probationary period policy existing at the time, and in the absence of any specific showing by the Complainant that Everson's slowness was tolerated for a longer period of time or greater number of shifts than the Complainant's (there was no showing as to when Everson's employment problems began to occur), combined with the other facts and circumstances of this case (the Complainant's inability to perform the job satisfactory and the discharge of both white and black clerks inside of 30 days) the Complainant's case must fail.

Signed and dated this 13th day of April, 1982.

EQUAL OPPORTUNITIES COMMISSION

Allen T. Lawent
Hearing Examiner

