

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

<p>Marvin Rumph 121 North Gilman St., #906 Madison, WI 53703</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Ohio Medical Products 3030 Airco Drive Madison, WI 53704</p> <p style="text-align: center;">Respondent</p>	<p>FINAL ORDER</p> <p>Case No. 2946</p>
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The Examiner issued his Recommended Decision dated March 24, 1983 to the parties. A timely appeal was filed by the Complainant.

Written briefs were filed and oral arguments were heard by nine members of the Madison Equal Opportunities Commission on July 28, 1983. Based upon a review of the record in its entirety, the MEOC enters the following:

FINAL ORDER

That the attached Recommended Decision of the Examiner is affirmed in its entirety, and that this case be and hereby is Dismissed.

Commissioners Abramson, Hayden, Kifle, Mendez, Silvers, Trachtenberg and Ware all join in entering the Final Order, above. Commissioner Cox dissented. Commissioner Maiden, while present for the oral arguments, abstained from participation in entering the Commission's Final Order.

OPINION

The Commission denies the Complainant's motion to remand the case for the taking of the testimony of Spencer Stewart as the Commission finds that Stewart's testimony would have had little (if any) probative value in this matter. The Complainant was discharged in March of 1982 and the primary events preceding his discharge occurred between about March, 1981 and March, 1982. Stewart, according to his own Affidavit (submitted in support of the motion to remand) - dated June 24, 1983 states that he worked for the Respondent until 1979. Under the facts and circumstances of this case, we find that Stewart's testimony would have little, if any, probative value.

As recited above, the majority agrees with the Examiner's recommended findings of fact, conclusions of law and order and his Recommended Decision is affirmed.

Signed and dated this 4th of August, 1983.

EQUAL OPPORTUNITIES COMMISSION

LeAnna Ware
MEOC President

**210 MONONA AVENUE
MADISON, WISCONSIN**

James M. Rumph 2354 Allied Drive Madison, WI 53711 Complainant vs. Ohio Medical 3030 Airco Drive Madison, WI 53704 Respondent	NOTICE OF RIGHT TO APPEAL FINAL ORDER Case No. 2946
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Attached is the Final Order of the Madison Equal Opportunities Commission (MEOC). If discrimination was found, the Respondent must comply with the Order or the Commission may seek judicial enforcement of the Order as prescribed by Section 3.23(9)(c)3., Madison General Ordinances and/or Respondent may be subject to the penalty described in Section 3.23(12), Madison General Ordinances. If no discrimination was found, the allegations have been dismissed. A Final Order may find discrimination regarding some allegations and no discrimination regarding other allegations.

Either or both parties may seek judicial review of the attached Final Order as provided by Section 68.13 of the Wisconsin Statutes, by common law or by any other available legal remedy.

Signed and dated this 4th of August, 1983.

EQUAL OPPORTUNITIES COMMISSION

James C. Wright
MEOC Executive Director

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

James M. Rumph 121 North Gilman, #906 Madison, WI 53703 Complainant vs. Ohio Medical 3030 Airco Drive Madison, WI 53704 Respondent	RECOMMENDED DECISION Case No. 2946
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A complaint was filed with the Madison Equal Opportunities Commission (MEOC) on May 3, 1982 alleging discrimination on the basis of race in regard to employment. Said complaint was investigated by Investigator/Conciliator Mary Pierce and an Initial Determination dated September 10, 1982 was issued

concluding that Probable Cause existed to believe that discrimination had occurred or was occurring as alleged.

Conciliation failed or was waived, and the matter was certified to hearing. A hearing was held commencing on January 24, 1983. The proceeding was adjourned on January 25, 1983 when an apparent settlement had been reached. However, the settlement did not ultimately materialize (the Complainant changed his mind), and the hearing resumed on March 1, 1983. Attorney Susan J. M. Bauman of Thomas, Parsons, Schaefer and Bauman, S.C. appeared on behalf of the Complainant, who also appeared in person. Lance Nobui (who is not an attorney), the Respondent's Employment and Affirmative Action Manager, appeared on behalf of the Respondent.

Subsequent to the completion of the Complainant's initial presentation, the Respondent made what essentially amounted to a Motion to Dismiss on the grounds that the Complainant had failed to establish a prima facie case of race discrimination. Said motion, after the presentation of arguments by both parties, was granted.

The Examiner, based on the record of the hearing, hereby enters the Recommended Findings of Fact, Conclusions of Law and Order and then discusses the reasons for granting the Motion to Dismiss.

RECOMMENDED FINDINGS OF FACT

1. The Complainant, James M. Rumph, is an adult black male who resides in the State of Wisconsin.
2. The Respondent, Ohio Medical Products (Airco, Inc.), is an employer doing business within the City of Madison, State of Wisconsin.
3. The Complainant was hired as a crater by the Respondent in October of 1973.
4. The Complainant was discharged by the Respondent as of March 18, 1982. The discharge was precipitated by an incident that occurred on March 10, 1982. On that day, the Complainant was working at the warehouse, a building separate from the main plant. He requested of his supervisor, Mike Bauer, that he be permitted to have lunch from 12 to 12:30 p.m. at the plant cafeteria so that he could join a friend. Permission to have lunch at that time was granted. The Complainant did not go to lunch, however, until about 12:10 p.m. He determined at that time that it would be too late to meet his friend, and tire Complainant instead drove to Wong's Cafe in a company van to pick up a carryout lunch. The Complainant did not have permission to take the company van off the company premises (except to return to the main plant) and he did not "punch out" for lunch or "punch in" when he returned.
5. Sometime after returning to work, approximately twenty minutes later than he had originally said he would, the Complainant was contacted by his supervisor and readily admitted his use of the van. While the Complainant had been gone, another employee who needed to use the van was unable to.
6. The Complainant was not immediately terminated or disciplined, as his supervisor chose to discuss the matter with other management personnel prior to taking any disciplinary action. The Complainant was terminated by letter (see Complainant's Exhibit 2) after being placed on suspension on March 15, 1982.
7. Managerial employees were allowed to use the van, after usual work hours and on weekends, for personal errands. Spencer Stewart, a black managerial employee, used the van on the same bases as white managerial employees.
8. Randy Jackson, a white non-managerial employee, was authorized to use the van to leave the premises on his lunch hour. As part of the duties of Jackson's job, he was required to meet truck deliveries upon arrival. These arrivals could occur at various times of the day. Rather than keeping a driver waiting (because Jackson was at lunch), Jackson was permitted to take his lunch break at any time that he was able and was allowed to use the van to do so, even off tile company premises, without asking each time. Jackson had different supervisors than humph (the Complainant). Also, Mark Pollock, on the days he substituted for Jackson, was able to use the van for lunch in the same manner as Jackson was allowed. Pollock is also white.
9. Other employees who performed the same or similar job duties as the Complainant and who were under Mike Bauer's supervision were authorized on various occasions to use the van as follows:

(a) with specific permission, employees were sometimes allowed to remove scrap lumber from the company premises to their home;

(b) on at least two occasions, Mike Bauer instructed certain employees to pick up an employee who lived in near proximity to the plant and who had called in to indicate that he was having car troubles.

10. The Complainant had asked to use the van on a single occasion, to go to court regarding his divorce proceeding, and was denied permission by Bauer to use the van. The Complainant did not ask to use the van on any other occasion.
11. Except for managerial employees (who were permitted to use the van), Bauer denied permission to use the van to one or another white employee approximately once a week (on the average). Requests were denied by Bauer for employees to use the van for such projects as moving, and driving relatives around town. Even employees who had sometimes been allowed to use the van (see Finding of Fact 9) were not allowed to use it every time and/or for every purpose requested.
12. Prior to his termination, the Complainant had within the immediately preceding year been given three written warnings for attendance problems (absenteeism and/or tardiness) including warnings on May 5, 1981, July 29, 1981 and August 4, 1981, the latter including a one day suspension. On October 23, 1981 the Complainant was given a written warning primarily for improper time recording. On February 12, 1982 Complainant, along with 12 or 13 white employees, was given a written warning for lining up at the time clock prior to the end of a shift.
13. In early March of 1981, the Complainant was given permission to use some scrap lumber at the plant and take it home. Upon finding no scrap lumber, the Complainant cut and attempted to remove new lumber from the Respondent's premises without specific permission. He received a written warning and four-day suspension for unauthorized use of company property and damage to company property.

RECOMMENDED CONCLUSIONS OF LAW

1. The Complainant is a member of the protected class of race within the meaning of Sec. 3.23, Madison General Ordinances.
2. The Respondent is an employer within the meaning of Sec. 3.23, Madison General Ordinances.
3. The Respondent did not discriminate against the Complainant on the basis of his race in regard to discharge from employment.

RECOMMENDED ORDER

That this case be and hereby is dismissed.

MEMORANDUM OPINION

The Complainant failed to carry his burden of proof to establish a prima facie case of race discrimination under Burdine;¹ i.e., the Complainant failed to show by a preponderance of the evidence that race was a substantial (or a determining) motivating factor in the Respondent's discharge of the Complainant.

I. RESPONDENT'S MOTION TO DISMISS CASE FOR LACK OF PROOF IS GRANTED

At the conclusion of the Complainant's presentation, the Respondent made what essentially amounted to a motion to dismiss tire complaint on the grounds that the Complainant had failed to establish a prima facie case of discrimination. After consideration of oral argument by the parties, the motion was granted.

Briefly, the Complainant's discharge was precipitated by an incident on March 10, 1982 when he used a company van without permission to pick up a take out lunch off the company premises and for having failed to punch out on his lunch period. (See Findings of Fact 4 and 5.)

As recited in Findings of Fact 7 through 11, the evidence presented showed that both black and white managerial employees used the van freely while non-managerial employees like the Complainant used the van only with permission. In any event, no persuasive evidence was presented to support the contention that race was a factor in granting permission to use and/or the actual use of the van.

Further, the Complainant had incurred at least five written disciplinary warnings and numerous verbal disciplinary warnings for various infractions within the year immediately preceding termination. While there are some minor disputes regarding the details leading to some of the written warnings, the Complainant presented no persuasive evidence in order to support any finding that race was a factor in administering the discipline or in the consideration of the discipline as part of, making the discharge decision.

II. MOTION TO HAVE WITNESS TESTIFY

The Complainant alleged that Spencer Stewart, a witness listed on his witness list, had not been served with his subpoena by the Dodge County Sheriff's Department as of March 1, 1983. The Complainant requested some accommodation for Mr. Stewart to testify later that afternoon or on the following day. The Complainant's motion to make some accommodation to allow Mr. Stewart to testify was denied in light of the fact that the hearing had originally convened on January 24, 1983 and had adjourned on January 25, 1983, the Complainant's failure to have properly subpoenaed the witness by March 1, 1983 was not a sufficient reason to delay the hearing. (Had Mr. Stewart been present he could have testified.)

Signed and dated this 24th of March, 1983.

EQUAL OPPORTUNITIES COMMISSION

Allen T. Lawent
Hearing Examiner

1. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. CT. 1089 (1981). Although Burdine was sex discrimination case, the U.S. Supreme Court analysis is generally applied to all Federal Title VII discrimination cases, and the Commission (MEOC) generally applies it when analyzing cases brought under the local Ordinance (Sec. 3.23, Madison General Ordinances).