

**EQUAL OPPORTUNITIES COMMISSION  
CITY OF MADISON  
210 MARTIN LUTHER KING, JR. BOULEVARD  
MADISON, WISCONSIN**

<p>Rondino Barlow 7039 Watts Road Madison, WI 53719</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Woodman's Food Market 725 S. Gammon Road Madison, WI 53719</p> <p style="text-align: center;">Respondent</p>	<p>HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER</p> <p>Case No. 3334</p>
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On November 29, and 30, 1994, a public hearing on the merits of the above captioned complaint was held before Hearing Examiner Clifford E. Blackwell, III in Room LL-120 of the Madison Municipal Building, 215 Martin Luther King, Jr. Boulevard. The Complainant, Rondino Barlow, appeared in person and by David J. Benforado of the law firm of Fox and Fox. The Respondent, Woodman's Food Markets, Inc. appeared by several employees and officers and by Bonnie A. Wendorff of the law firm of Boardman, Suhr, Curry and Field S.C. Based upon the record of the proceedings in this matter, the Hearing Examiner makes the following Recommended Findings of Fact, Conclusions of Law and Order:

**RECOMMENDED FINDINGS OF FACT**

1. The Complainant is a black, African American male who is married and has four children. He has a conviction record for armed robbery.
2. The Complainant was arrested at the Respondent's store known as Woodman's-West on October 15, 1993 for allegedly passing one or more forged checks. The Complainant was arrested for the same crime at his home on October 23, 1993. Ultimately all charges against the Complainant were dropped and no prosecution was undertaken.
3. The Respondent is a Wisconsin corporation with its primary business office located in Janesville, Wisconsin. The Respondent operates six (6) grocery stores in Wisconsin located as follows: one in Beloit, one in Janesville, one in La Crosse, one in Appleton and two in Madison.
4. The stores in Madison are generally identified as Woodman's-East located at 3817 Milwaukee Street, Madison, Wisconsin and Woodman's-West located at 711 South Gammon Road, Madison, Wisconsin.
5. On October 15, 1993, Woodman's-West was managed by Ken Larson. Beginning the following week, the store was managed by Dale Martinson.

6. Woodman's-West employed approximately 325 persons in October of 1993. Woodman's-West is organized into several different departments and areas including a liquor store, bakery, video store, meat market and other areas. One of the largest areas is designated the Front End. This is the area encompassing the check-out lanes and surrounding area. Each area has a supervisor with the Front End having nine supervisors who work a staggered schedule. Customers may check out in the Front End, the liquor store, the bakery or in some other areas.
7. In October of 1993, the president of the Respondent was Phillip Woodman.
8. In October of 1993, Jeff Woodman was a Front End supervisor. Jeff Woodman is not related to Phillip Woodman.
9. On or about October 13, 1993, the checkbook of Charles R. Blood, Jr. was stolen from his car at work. Shortly after the theft, checks illegally drawn on Blood's account were passed at both Woodman's-East and Woodman's-West. Checks dated October 13 and 15, 1993 were recovered by the Respondent.
10. On October 15, 1993 at approximately 8:54 a.m. a check illegally drawn on Blood's account was tendered to Shari McMullan, a checker in an express lane at Woodman's-West. At approximately 9:00 a.m. another check illegally drawn on Blood's account was tendered in the liquor store of Woodman's-West to Andy Clausen.
11. At some time after the Blood check was tendered at the liquor store, the office at Woodman's-West received a facsimile transmission from the manager at Woodman's-East alerting Woodman's-West about checks illegally drawn on Blood's account and tendered at Woodman's-East earlier in the day. Jeff Woodman posted this notice at the time clock so that everyone coming to work would know to be alert for checks drawn on Blood's account.
12. As a result of the posting of the "fax" and the discussion of the Blood checks, McMullan notified Jeff Woodman that she had taken such a check that morning. After investigating McMullan's report, Jeff Woodman searched other cash registers at Woodman's-West for other checks drawn on Blood's account. He found an additional check in the liquor store cash register.
13. Subsequent to the discovery of the Blood checks but still on October 15, 1993, the Complainant and an associate, Edward Lindsey, were shopping at Woodman's-West. They were observed by McMullan. McMullan identified the Complainant as the individual who had tendered the Blood check to her earlier the same day. She directly or indirectly notified Jeff Woodman of the Complainant's presence and her belief that he had passed the Blood check.
14. Jeff Woodman detained the Complainant and called the police. While waiting for the police, Jeff Woodman arranged for several Woodman's-West employees to observe and identify the Complainant. Among these employees were Andy Clausen, Shari McMullan, Dave Albert and Tara Harms. McMullan did not wish to participate in identifying the Complainant because she was frightened by the general appearance of the person who passed her the check and because she feared reprisal for her identification. Eventually McMullan agreed to participate in the identification so long as steps were taken to protect her identity.
15. McMullan and Clausen identified the Complainant as the individual who had tendered to them checks drawn on Blood's account earlier in the day. Harms identified the Complainant as the individual involved in an incident occurring sometime in September, 1993.

16. The police repeated some form of identification. During neither the Respondent's identification nor the police identification was the Complainant ever placed with other individuals having black or dark skin.
17. The police arrested the Complainant for forgery and transported him to jail. The Complainant spent the weekend in jail and was released on October 18, 1993 without charges having been filed.
18. Though it is customary for the police to offer Woodman's-West the opportunity to speak with an arrested individual prior to taking him or her away, the Respondent did not do so on this occasion. The purpose of this opportunity is to allow the Respondent to tell an arrested individual that he or she is not welcome back in the store and that trespass charges will be pursued if the individual returns.
19. On or about October 20, 1993, the Complainant returned to Woodman's-West to shop. At all times relevant to this complaint, the Complainant and his family lived within approximately one block of Woodman's-West.
20. Jeff Woodman became aware of the Complainant's presence in the store. He spoke to Dale Martinson, the store manager, about the Complainant's history and indicated that Martinson should speak to the Complainant about his being barred from the premises.
21. Martinson spoke to the Complainant and told him that he was not allowed back in the store. Martinson did not give the Complainant any specific reason for the exclusion. The Complainant states that Martinson indicated that the exclusion would remain in effect until the matter was resolved.
22. On October 23, 1993, the Complainant was arrested at his home on the same charge of forgery for which he had been arrested on October 15, 1993. Again the Complainant spent the remainder of the weekend in jail.
23. On October 26, 1993, the Complainant once again returned to Woodman's-West. When Jeff Woodman became aware of the Complainant's presence in the store, he requested that several managers and employees witness his discussion with the Complainant. Jeff Woodman told the Complainant that he was no longer welcome at any facility of the Respondent and that if the Complainant were found at any facility of the Respondent, he would be prosecuted for trespass. Jeff Woodman memorialized the confrontation with the Complainant and had the witnesses sign the note.
24. During all of these occasions, the Complainant cooperated with the Respondent's employees and obeyed the requests of the Respondent's employees. On October 26, 1993, the Complainant requested the opportunity to complete his purchases. Jeff Woodman acquiesced to the Complainant's request. Subsequent to the October 26, 1993 incident, the Complainant has not returned to the Respondent's store except to sit in the family car in the parking lot while his family shopped inside.
25. In September of 1993, the Complainant and his wife were shopping at Woodman's-West. They sought to purchase several small items using food stamps. Tara Harms told the Complainant and his wife that she could not accept the transaction because it failed to comply with the regulations for food stamp transactions. The Complainant appeared upset and stated that they

would try another check-out lane. Harms observed the Complainant and his wife get in line at another check-out line. Harms notified Jeff Woodman of her concern.

26. Jeff Woodman, after consulting with Harms, approached the Complainant and his wife and requested that they provide identification. No identification was provided but Jeff Woodman left the area before the transaction had been completed.
27. Later the same day, Harms told Jeff Woodman that after the Complainant and his wife had left the lane where they had been confronted by Jeff Woodman, they had walked by her check-out station and the Complainant's wife threatened her by asking when Harms got off of work and indicating that she would remember Harms' face.
28. Andy Clausen was employed as a Night Supervisor in the liquor store of Woodman's-West. Sometime in September or October of 1993, a young, black male became extremely angry when Clausen refused to serve him after the customer refused to provide identification. Clausen did not identify the Complainant as the person involved in this incident.
29. Shari McMullan reported to Jeff Woodman, Phillip Woodman and several other employees of the Respondent that she felt threatened or stalked by the Complainant. McMullan's fears were based upon the strong physical appearance and general demeanor of the person who passed her the Blood check and upon her observation of the Complainant sitting in a car in the Woodman's-West's parking lot. McMullan's fears are groundless and strictly the product of her imagination.
30. The Complainant did nothing to threaten or intimidate any employee of the Respondent.
31. Prior to October 20, 1993, the Respondent had taken no steps to exclude the Complainant from its stores.
32. On November 10, 1993, Dan Dunn, the Complainant's defense attorney, wrote to the Complainant providing information indicating that the Complainant had not been present at Woodman's-West at the time the Blood checks were tendered on October 15, 1993. Dunn provided statements from individuals attesting to the Complainant's presence at places other than Woodman's-West at the time in question.
33. On November 17, 1993, Dan Dunn again wrote to the Respondent informing it that all charges against the Complainant had been dropped by the Dane County District Attorney's office.
34. Phillip Maas, a car salesman at Zimbrick Motors, Eugene Soap, formerly an Account Representative at the AnchorBank branch at Nakoma Plaza and Martha Garel, an Administrative or Program Assistant who worked at the Broadway-Simpson Neighborhood Center, all provided statements indicating that the Complainant was in their presence at the time the Blood checks were being passed at Woodman's-West.
35. The Dane County District Attorney's office declined to pursue any criminal charge against the Complainant.
36. The Complainant did not tender checks drawn on the account of Charles Blood, Jr. at any time.

37. As to the Complainant's detention by Jeff Woodman on October 15, 1993, a reasonable person could have believed that the Complainant was the person responsible for tendering checks illegally drawn on the account of Charles Blood, Jr.
38. At the time Dale Martinson decided to exclude the Complainant on October 20, 1993, he, in good faith, believed he was doing so because the Complainant was alleged to have harassed or intimidated employees of the Respondent. Martinson's belief was erroneous.
39. Phillip and Jeff Woodman, in November of 1993, believed that the Complainant had harassed or intimidated employees of the Respondent and, based upon the Complainant's identification by McMullan and Clausen, had passed forged checks at Woodman's-West on October 15, 1993.
40. The Respondent would have excluded the Complainant on the basis of its own investigation and beliefs even if the Complainant had not been arrested.
41. The Complainant's arrest played no part in the Respondent's exclusion of him.
42. The Respondent is wrong in its beliefs about the Complainant's harassment or intimidation of its employees and the Complainant's guilt of passing forged checks on October 15, 1993.

### **RECOMMENDED CONCLUSIONS OF LAW**

43. The Complainant is a member of the protected class "arrest record."
44. The Respondent operates a public place of accommodation or amusement within the City of Madison.
45. The Respondent did not deny the Complainant the benefits or services of a public place of accommodation or amusement on the basis of his arrest record.

### **RECOMMENDED ORDER**

46. The complaint is hereby dismissed.

### **MEMORANDUM DECISION**

This case, one of first impression for the Commission and the State of Wisconsin, pits the interests of a person arrested for a crime against the interests of a provider of a public place of accommodation or amusement and employer in protecting its employees and customers from wrongdoing. The facts of the present matter make this situation more compelling because the arrested individual was entirely exonerated when the district attorney's office declined to prosecute him.

The complaint centers around the circumstances running from approximately October 13, 1993 until late November of that year. On or about October 13, 1993, Charles Blood, Jr. had his checkbook stolen while he was at work. Later that day, someone began passing checks drawn on this account at both Woodman's-East and Woodman's-West. These checks would usually be written for thirty dollars over the actual purchase. This is the amount that the Respondent's policy permits. The actual purchases in these transactions were usually minor.

On October 15, 1993, two more checks were passed early in the morning at Woodman's-East. Later that morning, the manager of Woodman's-East sent a facsimile transmittal to Woodman's-West in

order to alert them to be aware of such checks. Between the time that the first checks were received at Woodman's-East and the time that the facsimile was received at Woodman's-West two checks were passed at Woodman's-West.

One of the tellers who received one of the checks at Woodman's-West, Shari McMullan, informed her supervisor, Jeff Woodman, that she believed that she had received one of the forged checks. She and Jeff Woodman examined her cash drawer and found the forged checks. Jeff Woodman then examined all the cash drawers and found the second check in the liquor store.

Later that day, the Complainant and an acquaintance, Edward Lindsey, were shopping at Woodman's-West. McMullan saw the Complainant and identified him as the individual who had passed her the forged check earlier that morning. She informed Jeff Woodman of the Complainant's presence in the store. By the time Jeff Woodman and McMullan were able to find the Complainant he was checking out.

At that time, Jeff Woodman approached the Complainant and accused the Complainant of forging checks on the account of Charles Blood, Jr. The Complainant denied Jeff Woodman's allegations. Jeff Woodman detained the Complainant and called the police.

The Complainant was isolated in the back office at Woodman's-West. The Complainant's friend, Lindsey, went to inform the Complainant's family of the problem.

While the Complainant was detained, Jeff Woodman arranged for him to be observed by at least four employees, Shari McMullan, Andy Clausen, Dave Albert and Tara Harms. McMullan and Clausen identified the Complainant as the person who had passed them the forged checks earlier in the day. Clausen was the Clerk/Supervisor at the liquor store. Dave Albert, the Clerk on duty in the liquor store when another forged check was passed on October 13, 1993, was unable to identify the Complainant. Tara Harms, another Checker, identified the Complainant as the same person who had been involved in an incident relating to food stamps on an unspecified date in September of 1993.

Once the police arrived, they requested that the two employees from Woodman's-East be made available to identify the Complainant. Holly Irmen and Chris Henry came to Woodman's-West to observe the Complainant. Neither Erman nor Henry identified the Complainant as the person who passed them forged checks earlier that day.

The Complainant was arrested and taken to the Dane County Jail. He remained there over the weekend and was released on Monday, October 18, 1993 without charges having been filed. On or about October 20, 1993, the Complainant returned to Woodman's-West to shop. Woodman's-West was within a short walk of the Complainant's apartment and he did not hold a valid driver's license. The Complainant testified that he and his family shopped at Woodman's-West 4 or 5 times a week. Jeff Woodman was made aware of the Complainant's presence in the store. He notified Dale Martinson, the new store manager, of the Complainant's presence and indicated that the Complainant should be excluded from the store. Martinson had no involvement with the events of the prior Friday because he had not yet become the store manager. On October 15, 1993, Ken Larson was the store manager. Martinson did not take over those responsibilities until on or about October 18, 1993.

Martinson and Jeff Woodman located the Complainant. Martinson told the Complainant that he would have to leave the store and not to come back. The Complainant understood this to mean until the charges of forgery had been resolved. The Complainant did not object and left the store. Jeff Woodman had described the events of the prior week to Martinson as well as other allegations of

harassment and intimidation made against the Complainant by other employees of the Respondent. Martinson understood the reason for the Complainant's exclusion to be the allegations of harassment and intimidation.

On October 23, 1993, the Complainant was once again arrested on the original check forgery allegations. This arrest occurred at the Complainant's home. He spent the remainder of the weekend in jail. He was released again on October 25, 1993.

On October 26, 1993, the Complainant once again returned to Woodman's-West. He had almost finished his shopping, when Jeff Woodman and several other supervisors and employees approached him and told him that he could not shop in any Woodman's store and if he returned he would be prosecuted for trespass. After being allowed by Jeff Woodman to complete his shopping, the Complainant left without complaint. He has not returned to any of the Respondent's stores though he has waited in his family's car in the parking lot while they shopped.

On October 15, 1993, the Complainant did not go to work because of the weather. At the time, the Complainant worked for a roofing company doing several different tasks. He and his friend, Lindsey, instead went to Zimbrick Isuzu to test drive a car that Lindsey wished to buy. They arrived before Phillip Maas, the salesman with whom Lindsey had been dealing. They waited with the sales manager, Bill Schmidt. When Maas arrived around 8:30 or so, Maas, Lindsey and the Complainant took the car for a test drive. While driving around, the group decided to eat breakfast at McDonald's.

Before they could stop for breakfast, the Complainant needed to stop and withdraw money from his savings account. He banked at an AnchorBank office in or around Nakoma Plaza. The Complainant withdrew \$20 from his account at 8:51 a.m. The Complainant is functionally illiterate, and as usual, had the assistance of the teller. Maas, Lindsey and the Complainant then ate breakfast at the McDonald's across the street from the bank. After breakfast, they returned to Zimbrick Isuzu. From there Lindsey and the Complainant went to the Broadway Simpson Neighborhood Center so that the Complainant could leave his parole agent a money order for a restitution payment.

His parole agent was not at her office so the Complainant spoke with Martha Garel, the Center's Program Assistant. He remained with Garel until around 10:30 that morning. It was at this point that the Complainant and Lindsey returned to Madison's west side and went to Woodman's-West.

The Complainant contends that his exclusion from any of the Respondent's stores must be as a result of his arrest because of the close temporal relationship between his arrest and his exclusion. The Complainant also argues that the reasons for his exclusion given by the Respondent are clearly pretextual and give rise to an inference of discrimination. On the other hand, the Respondent contends that it excluded the Complainant because of reasons that had nothing to do with his arrest including its own investigation of the forged checks. Given these nondiscriminatory motives for the Complainant's exclusion, the Respondent believes that the complaint should be dismissed. The Complainant has demonstrated a prima facie case of discrimination by showing that he is a member of the protected class "arrest record", showing that the Respondent is a public place of accommodation or amusement and showing that he has been denied access to the Respondent's public place of accommodation or amusement under conditions that lead to the conclusion that his membership in a protected class was, at least in part, the reason for his exclusion.

The only element that is in doubt in the Complainant's prima facie case is the one drawing the causal link between the Complainant's arrest record and his exclusion. The fact that the Complainant was twice excluded from the Respondent's store within ten days of his arrest at Woodman's-West leads the

Hearing Examiner to draw the inference that the arrest was, at least in part, cause for the Complainant's exclusion. There were no other obvious events occurring at or about the same time that might lead to the Complainant's exclusion. The temporal connection though strong is not so strong as it would be if the Complainant had been excluded immediately after his arrest. Jeff Woodman testified that it was the usual practice for the police to allow an official of the Respondent to speak with an arrested individual immediately before transporting that person off the premises. It is at this time that the Respondent normally would exclude someone. Jeff Woodman could not testify that he had actually had such a conversation with the Complainant on October 15, 1993. The Complainant denied that Jeff Woodman had excluded him at that time.

Under the burden shifting approach dictated by the McDonnell Douglas/Burdine paradigm, the Respondent may rebut the Complainant's prima facie case by proffering a legitimate, nondiscriminatory reason for its actions. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). This represents a burden of articulation and not one of proof.

The Respondent asserts that the Complainant's exclusion resulted from the combination of three general problems the Respondent or its employees had with the Complainant. First, the Respondent alleges that the Complainant had engaged in food stamp fraud in September of 1993. Second, the Respondent alleges that the Complainant, on at least three separate occasions had harassed or intimidated employees of the Respondent. Third, the Respondent contends that independently of the Complainant's arrest, it believed on the basis of the identification by its own employees that the Complainant had submitted forged checks.

Any of these three reasons would represent a legitimate, nondiscriminatory reason for the Respondent to have excluded the Complainant from its premises. The first two reasons have nothing to do with the circumstances surrounding the Complainant's arrest and, if not pretextual, are legitimate explanations of the Respondent's actions. The third reason given by the Respondent relates to the circumstances surrounding the Complainant's arrest but in accordance with City of Onalaska v. LIRC, 120 Wis. 2d 363, 354 N.W.2d 323 (Ct. App. 1984) review denied, represents a valid defense to a claim of arrest record discrimination. The Complainant may still prevail if he can demonstrate that the reasons proffered by the Respondent are either not credible or represent a pretext for other discriminatory reasons. Burdine, supra; St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). The Complainant attacks each of the explanations proffered by the Respondent.

With respect to the so called food stamp incident, the Complainant asserts that it is not credible to believe that this incident played any part in the Respondent's actions. The Hearing Examiner agrees with the Complainant.

This incident occurred on an unspecified date in September 1993. Tara Harms, a Checker at Woodman's-West, allegedly observed the Complainant and a female companion, later identified as his wife, to be repeatedly purchasing small cost items and paying with higher denomination food stamps apparently in order to obtain the change that would be generated as a result of such a transaction. Harms testified that these types of transactions violate food stamp regulations. Harms refused to check out the Complainant. The Complainant appeared upset though no more than Harms would have been under similar circumstances. The Complainant indicated that he would try another check-out lane.



Harms observed the Complainant get into another lane. She called Jeff Woodman, the front end supervisor at the time, and reported her contact with the Complainant to him. She further pointed out the Complainant and his companion in another lane.

Jeff Woodman approached the Complainant and his companion. He requested that they provide identification for their food stamp purchases. Food Stamp recipients must provide official identification upon request. Neither the Complainant nor his companion were able to do so. Rather than dealing with this situation, Jeff Woodman left to deal with some other circumstance.

The Respondent provides no information to demonstrate that this incident played any part in the Complainant's exclusion. There is nothing in this record to indicate that the Complainant had actually violated food stamp requirements or that if he had, such a violation was serious enough to require his exclusion. Jeff Woodman apparently was sufficiently unconcerned that he believed he could tend to other matters rather than complete his discussions with the Complainant and his companion. Equally, Jeff Woodman did not call another supervisor to deal with the food stamp incident or to respond to Woodman's other duties so that Woodman could resolve the situation with the Complainant and his companion.

Given the low level response indicated by Jeff Woodman's actions, the Hearing Examiner finds that the so called food stamp incident did not play any significant part in the Respondent's decision to exclude the Complainant. There was testimony at hearing to the effect that Jeff Woodman recognized the person identified by McMullan as the same person who he had confronted over the food stamp question. This evidence of recognition falls considerably short of demonstrating that the food stamp incident played any part in the decision to exclude the Complainant. Though Tara Harms was called to identify the Complainant on October 15, 1993, the record indicates that the purpose of this identification related to an incident connected with though separate from the food stamp incident.

The second reason given by the Respondent for excluding the Complainant is that the decision makers reasonably believed the Complainant to have harassed and intimidated employees of the Respondent. In support of this contention, the Respondent points to three specific areas of concern.

First, after Jeff Woodman left the Complainant and his companion after the food stamp incident, Harms states that the Complainant and his companion walked past her check-out station and the companion asked Harms when she got off work. When Harms indicated that it was none of the companion's business, the companion stated that she would remember Harms' face.

The second incident related to a conflict involving Andy Clausen. Clausen, usually the Night Supervisor in the liquor store felt threatened by a young black male customer who Clausen refused to serve because the customer had refused to produce identification. Other managers and employees attributed this incident to the Complainant.

The third area of intimidation or harassment upon which the Respondent relies relates to McMullan's fear of the Complainant or the person whom she identified. McMullan testified that she accepted the forged check on October 15, 1993 even though it did not meet the Respondent's check cashing policy because she found the person tendering the check to be scary and strong looking. The Complainant, a Black male, is muscular. Despite the fact that the person tendering the check did not directly or indirectly threaten McMullan, she did not wish to identify the Complainant when Jeff Woodman asked her to do so. Steps were taken to hide McMullan from the view of the Complainant.

McMullan told numerous people of her fear of the Complainant including Phillip Woodman, the president of the Respondent. McMullan reported that she felt "stalked" by the Complainant because she observed him sitting in a car in the parking lot occasionally when she got off work. As noted above, the Complainant testified that he would occasionally wait in the family car while his family shopped because he had been excluded. Phillip Woodman testified passionately about his duty to protect his employees from harm.

Jeff Woodman testified that the above three incidents were central to the Respondent's perception that the Complainant had harassed or intimidated its employees. Dale Martinson, the store manager at the time of the Complainant's first exclusion, testified that in his mind he was excluding the Complainant on or about October 20, 1993 because he understood that the Complainant had been harassing or intimidating employees. It appears clear from this record that the only means for Martinson to have reached this conclusion was from his conversation with Jeff Woodman when Jeff Woodman came to him on that date. Phillip Woodman testified that he understood that the Complainant had been harassing employees based upon his conversations with Jeff Woodman, Shari McMullan and to a lesser extent, Tara Harms. The problem presented by this circumstance is that examination of the allegations of harassment and intimidation from the perspective of hindsight makes it clear that such allegations are unfounded. However, there is nothing in the record to clearly demonstrate that the Respondent's belief in October and November of 1993 was not held in good faith.

Evidence of a good faith belief rests in the fact that Harms was called to identify the Complainant on October 15, 1993. The record indicates that Harms had nothing to do with the forged checks that were passed on October 15, 1993. Harms, only involvement on this record occurred during the food stamp incident and the alleged subsequent threat. There was no reason for Harms to be called to identify the Complainant except for her allegations about having been threatened. It is remotely conceivable that Harms might have been called to identify the Complainant for the alleged food stamp fraud. Given the Respondent's failure to pursue the incident at the time or to follow up in any way, the Hearing Examiner is persuaded that Harms was not called because of the Respondent's desire to pursue the food stamp incident.

Based upon this record the Hearing Examiner concludes and believes that any reasonable person would also conclude that the Complainant had not engaged in any harassing or intimidating conduct. Harms clearly and unequivocally testified that the person who allegedly threatened her was the Complainant's companion and that the Complainant had not participated in the threat or made any separate threats. There is nothing in this record from which a reasonable person could conclude that the Complainant endorsed, encouraged or ratified the conduct of his companion. The Respondent's concern should have been directed towards the Complainant's wife, not him. Clausen testified equally clearly that the Complainant had never harassed or intimidated him. Clausen had been frightened by a young black male customer but did not identify the Complainant as that person.

Shari McMullan testified that she was afraid of the Complainant or at least the person who passed her a forged check on October 15, 1993. She admitted that no one had ever threatened her directly or in any manner other than by their mere physical appearance. McMullan stated that she felt stalked by the Complainant because she had observed him sitting in a car in the parking lot. There was no indication that the person McMullan saw did anything other than sit in a car. Phillip Woodman took great steps to listen to and accommodate McMullan's fears. It appears that she held some favored status given Phillip Woodman's immediate attention and his words of praise for McMullan.

The Hearing Examiner finds McMullan's fears to be overstated and not to be based upon any objective fact. It appears that McMullan exercised some significant degree of imagination in believing

that she was subject to danger under these circumstances. It is not possible to determine on this record whether McMullan's fears were a product of discriminatory animus either racial or on the basis of physical appearance but it can be said that any reasonable person presented with the facts as presented at hearing would have labeled McMullan ridiculous. Given this record, a reasonable person must conclude that the Complainant presented no actual or potential threat to any employee of the Respondent. However, it does not appear that Martinson had the benefit of a full evidentiary hearing when he decided to exclude the Complainant on October 20, 1993. Whether Phillip Woodman or Jeff Woodman looked into matters any more fully is doubtful on this record. Both Woodmans testified that they did nothing in the way of additional investigation once they received letters from the Complainant's attorney in November demonstrating that the Complainant should not be excluded because he could not have passed the forged checks. It was their understanding that the check incident did not form the basis for the Complainant's exclusion.

The Equal Opportunities Ordinance protects one from discrimination only on certain enumerated bases. It does not work to protect one from the effects of stupidity or mistaken judgments where those judgments are made on the basis of nondiscriminatory factors. The Hearing Examiner is convinced by this record that the Complainant has been done a grave disservice by the Respondent because of the Respondent's failure to thoroughly investigate its employees' allegations of harassment or intimidation. However, the Hearing Examiner believes that the Respondent came to its belief that the Complainant presented a threat to its employees as a result of nondiscriminatory statements from its employees. The law does not impose an obligation for the Respondent to correct its obviously mistaken conclusions. The Hearing Examiner finds this to be a shortcoming in the current legal framework.

Citing to the so called Onalaska defense, City of Onalaska v. LIRC, supra, the Respondent asserts that it conducted its own investigation and that investigation and not the mere fact of the Complainant's arrest supported its decision to exclude the Complainant. While making this argument, the Respondent also contends that there were the above discussed independent reasons for excluding the Complainant. The Complainant's argument about pretext with respect to this point partially rests upon the timing of the exclusion, the failure of the Respondent to consider the Complainant's explanation, the fact that some or all of the independent grounds stated by the Respondent are erroneous and most strongly the fact that the Respondent was provided with information demonstrating the Complainant's innocence and the Respondent's failure to change its decision.

As stated above, the timing of the Complainant's exclusion goes far enough to demonstrate that there is a prima facie case of discrimination but it fails to demonstrate pretext. Had the exclusion occurred immediately after the arrest, the Complainant would have a stronger argument about pretext as well as discrimination.

The failure of the Respondent to consider the Complainant's explanations or to investigate his statements regarding his whereabouts is not evidence of pretext nor does it render the Respondent's explanation incredible. The Respondent had what it could reasonably believe to be two strong eyewitness identifications from reliable employees. The requirements of an independent investigation do not require the investigation to be either exhaustive, fair or even correct. From the perspective of the Respondent, its job is not to conduct an investigation capable of convicting an accused wrongdoer in a court of law but only to examine the facts sufficiently to determine in a reasonable person's mind that someone has done something wrong. Under the circumstances, the Hearing Examiner cannot conclude that the Respondent's reliance on McMullan's and Clausen's identification of the Complainant is unreasonable. This is particularly true since both McMullan and Clausen renewed their identification of the Complainant at hearing. At hearing, both McMullan and Clausen testified

that neither of them worked for the Respondent any longer. They owed the Respondent no debt of loyalty. Clausen, in fact, testified against the Respondent's interest with regard to the allegation of harassment. Though the Hearing Examiner, in light of information not seemingly available to McMullan and Clausen, believes that their identification of the Complainant is erroneous, he cannot say that their identification and belief in it is unreasonable.

The Complainant also attacks the validity of the identification procedures used by the Respondent in order to show that the Respondent's investigation was a sham. The Complainant was isolated in a back office and was the only black male present for identification. Again, while this procedure might not meet constitutional requirements for a "line up" in the context of a criminal investigation, it does not render the Respondent's investigation, conducted exclusively by Jeff Woodman, invalid. The fact that in hindsight, the Respondent's explanations have proven to be erroneous is not by itself sufficient to demonstrate that they are pretextual in nature. As noted above, one must determine whether those explanations were given in good faith and in the reasonable belief of their truth. While the Hearing Examiner does not believe that the so called food stamp incident played any part in the Complainant's exclusion, the record is devoid of information indicating that it has been presented in bad faith or is a pretext for other discriminatory reasons. Simply showing that a reason given is pretextual is generally not considered to be necessarily of itself sufficient to demonstrate that a discriminatory motive actually motivated the Respondent. St. Marys Honor Center, supra. The Hearing Examiner has previously indicated that though erroneous, Martinson's belief in the allegations of harassment and intimidation was founded in a good faith understanding of the facts as presented to him. Under this circumstance, the Hearing Examiner cannot find that Martinson's erroneous belief that the Complainant was harassing or intimidating employees was an illegal pretext for other discriminatory motives. The failure of the Respondent to reconsider its decision to exclude the Complainant after having received the November 10 and 17, 1993 letters from the Complainant's attorney, while troubling, do not demonstrate pretext. Both Phillip Woodman and Jeff Woodman testified that they determined that the information provided by Dunn was essentially irrelevant to the decision to exclude the Complainant because the decision was made on the grounds of their belief that the Complainant was harassing or intimidating employees. To the extent that this belief was reasonable at the time the Respondent made the decision, it need not reconsider its earlier decision. To require differently would undercut the legitimacy of the Respondent's earlier action. There is also an additional argument raised by the Respondent that regardless of the information provided by Dunn, it still reasonably believed the identifications made by its employees. While the Hearing Examiner concludes that a reasonable person could easily find that the Complainant could not have been the person who presented forged checks at Woodman's-West, as of November of 1993, that conclusion was not necessarily compelled by the information available to the Respondent that the District Attorney's office declined to prosecute the Complainant. While on one hand, the decision may reflect a belief in the Complainant's innocence, it may also reflect a lack of administrative resources or the placing of a different priority on prosecution of crimes such as forgery of small amounts as opposed, say, to assault or battery. On this record, given the state of the law, the Hearing Examiner finds that the Complainant has failed to carry his burden of proof on his claim of discrimination. The complaint must be dismissed. The Hearing Examiner's decision should not be read to condone the Respondent's actions in this matter. While the Respondent has a legitimate right to protect itself from wrongdoing and an affirmative obligation to protect its employees and customers, its stubborn reliance on a cursory investigation has worked a disservice to the Complainant and imposed an unnecessary and damaging penalty upon a person who any reasonable person would find innocent of the allegations made against him. In the high intensity glare of hindsight, one can see that the allegations of harassment or intimidation are not founded in truth. Similarly, the allegations of check forgery carry almost no weight. Against the identification of the Complainant by McMullan and Clausen, one must

look at the statements of three independent witnesses who assert that the Complainant could not have been at the Respondent's store. These witnesses have no loyalty to the Complainant and their testimony is highly credible. When one adds the fact of the Complainant's near illiteracy, the case against him is reduced to the slightest whisper in comparison to the evidence supporting the Complainant. Since the Respondent now has the advantage of time and perspective, it would be appropriate for the Respondent to reexamine its earlier decision and allow the Complainant to once again shop at the Respondent's stores. The Hearing Examiner strongly urges the Respondent to reverse its earlier decision. Though an act of discrimination may not have occurred, the Complainant has suffered unjustly at the hands of the Respondent. As a matter of common sense and good community and customer relations, the Respondent should be willing to allow the Complainant to rejoin his family in shopping at its stores.

Signed and dated this 29th day of August, 1996.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III  
Hearing Examiner