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

John Duncan 554 Maywood St Madison WI 53704 Complainant vs. H James and Sons Inc 4624 Ideal Rd Fennimore WI 53809 International Union of Operating Engineers Local Union #139 4702 S Biltmore Ln Madison WI 53718 Respondent	HEARING EXAMINER= S DECISION AND ORDER Case No. 20022040

BACKGROUND

On March 5, 2002, the Complainant, John Duncan, filed a complaint with the Madison Equal Opportunities Commission (Commission). The complaint charged that the Respondent, H. James and Sons, Inc., required him to give his position on a piece of construction equipment to a more senior White employee so that the White employee might have the opportunity to work more hours and to gain some overtime hours. The Complainant was the only Black or African American employee at the job site. The complaint also alleged that the Respondent constructively discharged him from employment because of his race and/or color. The Respondent denied all allegations of discrimination.

On June 24, 2003, a hearing was held before Commission Hearing Examiner, Clifford E. Blackwell III. On December 22, 2003, the Hearing Examiner issued Recommended Findings of Fact, Conclusions of Law and a Recommended Order concluding that there was no discrimination and the complaint should be dismissed.

The Complainant appealed from the Hearing Examiner= s Recommended Findings of Fact, Conclusions of Law and Order. On May 27, 2004, the Commission issued an Interim Order affirming the Hearing Examiner= s Recommended Finding of Fact and Conclusions of Law with respect to whether the Complainant had been constructively discharged. The Commission found there was no evidence to support that allegation of discrimination. With respect to the allegation that the Respondent had discriminated against the Complainant on the bases of race and color by requiring him to give his position on an articulated truck to a White employee, the Commission vacated the Hearing Examiner= s Recommended Finding of Fact and Conclusions of Law and entered its own

conclusion that discrimination had occurred. The Commission remanded that allegation to the Hearing Examiner for further proceedings relating to damages.

As part of the proceedings prior to a hearing on the issue of damages, it became clear that the Complainant wished to call two expert witnesses as part of his case in chief on damages. The Respondent objected to the Complainant= s calling the expert witnesses and moved to exclude their testimony. The Hearing Examiner gave the parties the opportunity to submit written argument.

DECISION

The procedural posture of this case is complex and interesting. Prior to hearing on the underlying complaint, the Complainant chose not to identify or to call expert witnesses on the issue of damages. The Respondent, prior to hearing, asked that the hearing be bifurcated along liability and damage lines. The Respondent= s request for bifurcation appears to have been based, at least in part, upon an issue of damages and privilege relating to a matter under seal in the United States District Court for the Eastern District of Wisconsin. The Hearing Examiner denied the request for bifurcation, indicating that while bifurcation has occasionally been ordered, nothing in the record indicated that it was necessary in the present case.

The issue of privilege and damages arose during the questioning of the Complainant during his cross-examination. Essentially, the Respondent wished to elicit testimony concerning statements made by the Complainant in connection with a separate matter that had been settled and placed under seal with the agreement of the parties. The Respondent also wished to question the Complainant about any amounts that he may have received as a result of the settlement of the other matter. Because the settlement agreement contained a confidentiality agreement and sanctions for violation of the agreement, the Complainant sought to exclude any testimony relating to that separate matter.

During the hearing, the parties and the Hearing Examiner attempted to secure a waiver of the confidentiality agreement from the opposing party in the other matter. While there was an indication that such a waiver might be possible, the attorney contacted during the hearing was unable to consent to a waiver without first consulting his client. As a result of this discussion, the Hearing Examiner, reluctantly, agreed to bifurcate the hearing on liability and damage lines.

At the time of bifurcation, the Hearing Examiner indicated that the testimony already received on damages would stand and additional testimony including further examination and testimony of the Complainant would be permitted.

The Complainant now wishes to call witnesses not identified as part of the earlier proceedings. He contends that there is no prejudice to the Respondent and that it is only fair that the Complainant be given an opportunity to call whatever witnesses he wishes to demonstrate his damages. The Respondent contends that the Complainant should be limited to that testimony already given and to those witnesses identified as part of the earlier proceeding. The Respondent argues that it should not be put to additional expense or time beyond what was originally contemplated.

The Hearing Examiner admits that there is a certain appeal to holding the Complainant to the case that he was set to put on at the time of the original hearing. However, this approach ignores the procedural position of this case.

While limiting the Complainant to the witnesses he had identified at the time of hearing would be appropriate if this matter were being heard on the Hearing Examiner= s bifurcation, it is not

appropriate now because the issue of damages is to be decided as part of a remand from the Commission.

By considering the case on its merits and reversing the Hearing Examiner, the Commission essentially negated the earlier procedural stance of the complaint. It might be different if the Commission had remanded for further fact finding prior to a determination of liability. In the latter circumstance, the Commission= s action does not change the relationship between the parties. By making a determination of liability, the Commission alters the stance of the parties, creating a new obligation. This change of relationship requires a new procedural setting.

The Commission= s remand for further proceedings contemplates a complete record on the issue of damages.

The Commission must have access to all relevant materials if it is to render a considered judgment. To artificially limit the record on the issue of damages would be contrary to the Commission= s needs and obligations.

On this record, the Respondent presents no compelling reason for limiting the scope of testimony on the issue of damages. It is insufficient to say that it will be more costly in time and money to the Respondent. The same applies to the Complainant. The Respondent does not indicate that it will be prejudiced by permitting the Complainant to call extra witnesses, particularly if the Respondent is given the opportunity to take discovery on the issue of damages and to present counter-argument and witnesses.

ORDER

For the foregoing reasons, the Hearing Examiner denies the Respondent= s motion to limit testimony on the issue of damages. Further scheduling will be addressed by separate cover.

Signed and dated this 11th day of February, 2005.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner

John Duncan 554 Maywood St Madison WI 53704 Complainant vs. H James and Sons Inc 4624 Ideal Rd Fennimore WI 53809 International Union of Operating Engineers Local Union #139	COMMISSION'S DECISION AND INTERIM ORDER Case No. 20022040

4702 S Biltmore Ln Madison WI 53718 Respondent	

BACKGROUND

The Complainant, John Duncan, filed a complaint of discrimination with the Madison Equal Opportunities Commission (Commission) on March 5, 2002. The complaint alleged that the Respondent, H. James and Sons, Inc., discriminated against the Complainant on the bases of his race (African American) and color (Black) when an on-site supervisor asked the Complainant if another employee who is White could run the articulated dump truck in order to gain over-time hours for the White employee. The Complainant acquiesced in his supervisor's request, but felt that he had been wronged and refused to report to work the following week and asserted that he had been constructively discharged from employment as a result of the Respondent's discriminatory attitude. The Respondent denies any racially discriminatory motive in making the request of the Complainant rather than of another White employee who was also driving an articulated dump truck. The Respondent also contends that it did not cause the Complainant to constructively discharge himself and that it sought the Complainant's return to work.

Subsequent to an investigation, a Commission Investigator/Conciliator issued an Initial Determination concluding that there was probable cause to believe that the Respondent had discriminated against the Complainant as alleged in the complaint. Efforts at conciliation of the complaint failed and the complaint was transferred to the Hearing Examiner.

The Hearing Examiner held a public hearing commencing on June 24, 2003, which continued through June 26, 2003. Subsequent to the parties' opportunity for submission of briefs and written argument, the Hearing Examiner, on December 22, 2003, issued Recommended Findings of Fact, Conclusions of Law and Order finding that the Respondent had not discriminated against the Complainant and recommending that the complaint be dismissed.

The Complainant appealed from the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order. The complaint was transferred to the Commission and the parties were given the opportunity to submit briefs and written argument in support of their respective positions. On May 13, 2004, the Commission met to consider the Complainant's appeal. Commissioners Bayrd, Enemuoh, Trammell, Hicks, Marunich, Morrison, Ross, Smith and Zipperer considered the arguments of the parties and the record, as a whole.

DECISION

As race and color are essentially treated, in a case like this one, as identical claims, the Commission considered the complaint to state two claims of discrimination, one for constructive discharge and one for less favorable terms and conditions of employment stemming from the Complainant's replacement in the articulated dump truck on September 28, 2001. Review of the record leads the Commission to different results with these claims.

With respect to the claim that the Complainant was constructively discharged from his employment by the actions of the Respondent, The Commission incorporates by reference the conclusion and analysis of the Hearing Examiner, contained in the Recommended Findings of Fact, Conclusions of Law and Order, dated December 22, 2003, as if fully set forth herein. The Commission finds that the

Hearing Examiner's conclusion that the Complainant voluntarily left the employment of the Respondent and was not forced by conditions to constructively discharge himself is fully supported in the record.

However, the Commission, after review of the record, concludes that the Hearing Examiner erred in finding that there was no discrimination with respect to the Respondent's request that the Complainant make his articulated dump truck available to a White employee. It is not solely that the Complainant was asked to permit a more senior employee be allowed to drive the truck and accumulate overtime hours, but that there was another White employee, driving another articulated dump truck, who was not asked to give up his truck to the more senior employee.

The Commission accepts that the Complainant met his burden of proof to establish a prima facie claim of discrimination with respect to the request to give up his space in the articulated dump truck. The Commission also can accept that the Respondent articulated a legitimate, nondiscriminatory reason for its asking the Complainant to relinquish his truck rather than allowing him to remain with his assignment or by asking Roland Reuter, the other articulated dump truck driver, to give up his truck. The reasons proffered by the Respondent were that Ashmore was more senior and was more experienced than the Complainant, and Ashmore needed additional hours to entitle him to retain his health insurance during the off season. It was important to the Respondent to keep Ashmore happy because as a senior and experienced employee, Ashmore helped to maintain the Respondent's competitive position. With respect to Reuter, the Respondent explained that despite a slight seniority advantage to the Complainant, Reuter was more experienced and more productive in operating the articulated dump truck than the Complainant.

Where the Commission differs with the Hearing Examiner is at the next step of analysis. The Respondent having presented several explanations for its replacement of the Complainant by Ashmore, the Complainant can and should still prevail because the record casts doubt on the credibility of the Respondent's explanations or reveals that such explanations are more likely a pretext for an illegally discriminatory motive. The Commission finds that the Respondent offers contradictory explanations relating to seniority, i.e., that Ashmore's seniority justifies bumping the Complainant, but that the Complainant's seniority, albeit slight over Reuter, was disregarded by the Respondent.

While the Hearing Examiner seems to have been convinced by the Respondent's explanation that Reuter was more productive than the Complainant in the use of the dump truck, the Commission finds that the record represents an after-the-fact rationalization rather than a contemporaneous factor in the Respondent's decision to ask the Complainant rather than Reuter to give up his truck to Ashmore.

The Commission finds that the inconsistencies and lack of clearly corroborative evidence raises doubts about the credibility of the Respondent's witnesses. The Commission finds that a reasonable person would have doubts about the credibility of the Respondent's witnesses due to the inconsistent nature of the testimony and the after-the-fact nature of on-site manager Jerry Lenz's testimony about the relative production of Reuter and the Complainant. This lack of credibility raises doubts about the Respondent's proffered reasons. Cleveland v. Home Shopping Network, Inc., _____, F.3d _____, 2004 WL 1050865 (11th Cir. May 11, 2004).

While the Hearing Examiner accepted the credibility of the Respondent's witnesses and their explanations, the Commission is not so convinced. Where the Respondent chose to ask the only African American employee to relinquish his truck and thereby lose the opportunity to receive overtime assignments in favor of two White employees, the Respondent must be able to explain its reasons without raising issues of credibility. It is because the Commission has doubts about the

Respondent's credibility that it finds the Hearing Examiner erred in concluding that the Complainant had not met his burden of proof to show that the Respondent's witnesses were not credible.

Since the Hearing Examiner did not make any finding with respect to the issue of damages, the record is incomplete with respect to this issue. Accordingly, the Commission will remand the complaint to the Hearing Examiner for further proceedings on the issue of damages.

The Commission has not issued a Notice of Right to Appeal in this matter since it is remanding a portion of the complaint for further proceedings. The Commission believes that both parties will be able to exercise their appeal rights once all issues pending before the Commission are resolved by either the Hearing Examiner or the Commission.

ORDER

For the foregoing reasons, the Commission dismisses that portion of the complaint relating to the Complainant's allegation of constructive discharge. The Commission remands those allegations of the complaint relating to differential treatment based upon the Complainant's race and/or color in his terms and conditions of employment stemming from the incident of September 28, 2001 to the Hearing Examiner for further proceedings consistent with this decision.

With respect to the allegation of discrimination in the terms and conditions of employment, Commissioners Bayrd, Morrison, Ross, Smith and Zipperer joined in the decision. The Commission's action was opposed by Commissioners Enemuoh-Trammell, Hicks and Marunich.

Joining the Commission's decision to dismiss the allegations relating to constructive discharge were Commissioners Bayrd, Enemuoh-Trammell, Hicks, Marunich, Morrison, Ross, Smith and Zipperer. There were no Commissioners in opposition.

Signed and dated this 27th day of May, 2004.

EQUAL OPPORTUNITIES COMMISSION

Megin Hicks
Vice-President

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

John Duncan 554 Maywood St Madison WI 53704 Complainant vs. H James and Sons Inc 4624 Ideal Rd Fennimore WI 53809	HEARING EXAMINER= S RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW Case No. 20022040

International Union of Operating Engineers Local Union #139 4702 S Biltmore Ln Madison WI 53718 Respondent	

This matter came before Madison Equal Opportunities Commission Hearing Examiner Clifford E. Blackwell, III on June 24, 2003, and continued through June 26, 2003. The Complainant, John Duncan, appeared in person and by Attorney Andrew J. Bryant, Reynolds and Associates. The Respondent, H. James & Sons, Inc., appeared by its corporate representative, Jerry Lenz, and by Attorney Daniel D. Barker of Melli, Walker, Pease & Ruhly, S.C. Based upon the evidence presented, the Hearing Examiner now makes his Recommended Findings of Fact, Conclusions of Law and Order, as follows:

RECOMMENDED FINDINGS OF FACT

1. The Complainant, John Duncan, is an African-American male with dark skin.

2. The Respondent, H. James & Sons, Inc. (the Respondent or HJS), employs construction workers in Madison.

3. In 2001, the Respondent worked on two Southeast Madison construction sites: the Lost Creek and Quarry Cove projects. Lost Creek and Quarry Cove were both covered under the Heavy and Highway Construction Agreement, which governs relations between the Respondent and the International Union of Operating Engineers Local 139 (the Union).

4. The Complainant began working for the Respondent on August 6, 2001.

5. The Complainant initially worked at Quarry Cove, operating scrapers for the Respondent. On August 8th, HJS foreman Jerry Lenz reassigned the Complainant to Lost Creek. The Complainant continued working there for seven weeks, using the same equipment.

7. On September 26th, Jerry Lenz asked the Complainant about his experience with articulated trucks. The Complainant had none, but Lenz provided some instruction and the Complainant began using this equipment later that day. The Complainant drove an articulated truck until Friday afternoon, September 28th, when long-term employee Avery Ashmore took over.

8. Avery Ashmore is white.

9. Lenz had spoken with the Complainant earlier that day about letting Ashmore operate the articulated truck. This conversation was brief, but clearly precipitated the Duncan/Ashmore switch. Ashmore began operating the articulated truck Friday afternoon, September 28th.

10. Between September 26th and 29th, the Respondent had another articulated truck running alongside the Duncan/Ashmore vehicle. Roland Reuter was operating that second truck. The Complainant had been working for the Respondent approximately two weeks longer than Reuter, but Reuter had more experience driving articulated trucks. Reuter was not approached about stepping aside for Ashmore.

11. After leaving work Friday afternoon, September 28th, the Complainant never returned.

12. The Complainant immediately contacted the Union, claiming that Lenz had removed him from his equipment and terminated his employment. Specifically, the Complainant alleged that the Respondent violated the Heavy and Highway Construction Agreement.

13. In pertinent part, the Heavy and Highway Construction Agreement states that employees regularly assigned to certain equipment shall receive preference when that equipment is required on regular workdays, Saturdays, Sundays, holidays and other overtime.

14. The Complainant was not terminated; Lenz merely approached him about letting Ashmore operate his articulated truck.

15. The Complainant was absent from work the following Monday morning, November 1st. Lenz called the Complainant around 7:30 a.m. and after ascertaining his whereabouts, indicated that the Complainant could begin working again immediately. The Complainant refused, claiming certain problems still required Union intervention.

16. Union business agent Rick Bolton investigated this particular complaint. After speaking with Lenz and the Complainant, among other workers employed alongside the Complainant, Bolton determined that Duncan was neither involuntarily displaced from the articulated truck nor terminated.

17. Neither Bolton nor Union attorney Alexia Kulwiec filed a grievance for the Complainant.

18. The Complainant subsequently obtained other employment through the Union hiring hall. The Complainant began working for New Berlin Grading in early October, 2001.

RECOMMENDED CONCLUSIONS OF LAW

1. Being an African-American man with dark skin, the Complainant belongs to the protected classes A race@ and A color@ under the Madison Equal Opportunities Ordinance.

2. The Respondent is an employer within the meaning of the Ordinance.

3. The Respondent neither involuntarily displaced the Complainant from certain equipment, denying him overtime opportunities, nor terminated his employment based upon his race and/or color.

4. The Respondent did not violate Madison General Ordinances Section 3.23(8)(a), which prohibits employers from discriminating against employees based upon race and color, among other factors, with respect to compensation and/or the conditions and privileges of their employment.

RECOMMENDED ORDER

The Complaint is dismissed.

MEMORANDUM DECISION

In 2001, H. James & Sons, Inc. performed work on two Southeast Madison construction projects: the Lost Creek and Quarry Cove projects. In both cases, the Respondent employed scrapers and articulated trucks for large earthmoving operations. Scrapers move earth and rock. Articulated trucksC which pivot behind the operator, unlike standard dump trucksC transport excavated material when scrapers are not appropriate. Lost Creek and Quarry Cove were both covered under the Heavy

and Highway Construction Agreement, which governs relations between the Respondent and the International Union of Operating Engineers Local 139 (the Union).

John Duncan began working for the Respondent on August 6, 2001, performing scraper work at the Quarry Cove project. The Complainant worked there for several days. On August 8th, foreman Jerry Lenz reassigned the Complainant to Lost Creek, where he remained for seven weeks, using the same equipment. On September 26th, Lenz asked the Complainant about his experience with articulated trucks. The Complainant had none, but Lenz provided some instruction and the Complainant began using this equipment later that day. The Complainant drove an articulated truck until Friday afternoon, September 28th, when long-term employee Avery Ashmore took over.

Earlier that day, Lenz had approached the Complainant about letting Ashmore drive his articulated truck. The parties disagree about what Lenz said during this conversationC whether Lenz ordered the Complainant off the truck or merely asked whether Ashmore could take overC but this brief discussion clearly precipitated the Duncan/Ashmore switch. The Complainant never returned after the 28th, believing Lenz had actually fired him. Lenz denies saying anything about termination, and the Respondent strongly questions whether the Complainant could reasonably have perceived that Lenz was terminating his employment.

Between September 26th and 29th, the Respondent had another articulated truck running alongside the Duncan/Ashmore vehicle. The other driver was Roland Reuter. The Complainant had been with the Respondent longer than Reuter, but Reuter had more experience driving articulated trucks. Reuter was never approached about letting Ashmore operate his truck. Ashmore continued working for the Respondent through 2001.

In pertinent part, the Heavy and Highway Construction Agreement states that employees regularly assigned to certain equipment shall receive preference when that equipment is required on regular workdays, Saturdays, Sundays, holidays and other overtime. Duncan initially complained to the Union about having been displaced from his equipment and then terminated. The Complainant asserted that the Respondent had violated the Heavy and Highway Agreement, but Union business agent Rick Bolton disagreed. Bolton investigated the complaintC speaking with Lenz and the Complainant, among other workers employed alongside himC and determined that the Complainant was neither involuntarily displaced nor terminated.

After leaving work Friday afternoon, September 28th, the Complainant never returned, mistakenly believing Lenz had fired him. The Complainant was never actually terminated; foreman Lenz had merely approached him about letting Ashmore operate the articulated truck. Lenz called the Complainant the following Monday morning, and although Lenz offered immediate work, the Complainant apparently refused, claiming certain problems still required Union intervention.

Because the Respondent had work available, neither Bolton nor Union attorney Alexia Kulwiec pursued the matter any further. Kulwiec recommended that the Complainant contact his supervisor about reclaiming his position with the Respondent. Unhappy with this resolution, the Complainant filed discrimination complaints with the Madison Equal Opportunities Commission, claiming the Respondent and Local 139 had violated the Madison Equal Opportunities Ordinance. The Complainant is African-American. Roland Reuter, Avery Ashmore, Jerry Lenz, project overseer Harlowe James, and HJS President and Equal Opportunity Officer Richard James are white.

The Complainant advances two general arguments, both alleging race/color discrimination. First, the Complainant maintains that HJS foreman Jerry Lenz removed him from certain equipment without

offering any real choice, replacing him with Avery Ashmore and thereby preventing him from working overtime. Second, the Complainant claims the Respondent fired him that afternoon, September 28th, when Ashmore replaced him. These general claims contain five specific arguments, which the Complainant addresses individually: (1) foreman Lenz offered no meaningful choice about stepping aside for Ashmore; (2) neither seniority nor skill explain why Lenz removed the Complainant and terminated his employment; (3) the Complainant could reasonably have perceived that Lenz ordered his removal and then fired him; (4) through its corporate cultureC hiring few minorities and treating them differentlyC the Respondent allowed discrimination against the Complainant; and (5) the Madison Equal Opportunities Ordinance prohibits adverse employment actions based upon race and color.

The Complainant correctly notes that the Madison Equal Opportunities Ordinance prohibits employers from discriminating against employees and applicants based upon race and color. Madison General Ordinances Section 3.23(8)(a) states that employers may neither discharge nor discriminate against anyone with respect to compensation, terms, conditions, or privileges of employment, based upon sex, race, religion, color, national origin, etc. However, the record does not support the remaining contentions. The Hearing Examiner will address each argument separately. Essentially, the evidence shows that Lenz approached the Complainant about giving long-term employee Avery Ashmore extra hours, that the Complainant acquiesced, and that the Complainant subsequently never returned, believing Lenz had terminated him.

Regarding his claim that Lenz (a) offered no meaningful choice about remaining aboard the articulated truck, and (b) terminated him after replacing him with Ashmore, the Complainant emphasizes the following points: among HJS employees, he alone was African-American; foreman Lenz never approached anyone else about stepping aside for Ashmore; Lenz never specifically informed him that he could decline; Lenz never inquired about his availability for work the following Monday morning; and the Respondent did not tolerate insubordination, which fact was reflected in its written policies for employees: A [y]ou are expected to follow the instructions of your supervisor. Insubordination and/or failure or refusal to carry out instructions and orders or to perform assigned work or suggesting or directing another employee to engage in such conduct is prohibited.@ The Complainant also underlines the testimony of coworkers Roland Reuter and Ed Monahan, who indicated that when the foreman requested something, employees were generally expected to comply.

Although the Complainant may have felt personally intimidated when Lenz asked him about switching with Ashmore, the record does not convincingly demonstrate that Lenz singled him out for racial reasons, forced him off the articulated truck, and/or said that his employment would cease Friday afternoon, September 28th. Management was simply trying to get AshmoreC its senior employeeC additional overtime hours for health insurance purposes. Moreover, Ashmore and Reuter were more experienced and arguably more productive articulated truck drivers than the Complainant, meaning the Complainant was logically chosen for replacement. The Complainant maintains that Lenz gave him little choice about stepping aside for Ashmore, but this assertion rests mainly upon speculation. Witnesses Reuter and Monahan indicated that compliance was generally expected when the foreman requested something, but Reuter and Monahan also confirmed that Lenz asked the Complainant about letting Ashmore take over, and that the Complainant consented. Rob Trumm also witnessed the Lenz/Duncan conversation. Trumm likewise confirmed that the Complainant approved when Lenz proposed the switch. The Complainant knew his rights under the Heavy and Highway Construction Agreement, and there was nothing inherent in this situation that could reasonably have given him apprehension about enforcing those rights. The Complainant had numerous opportunities to voice his disapproval, but instead acceded when Lenz asked whether Ashmore could replace him.

Ashmore himself even spoke with the Complainant about the situation, and again the Complainant said everything was fine.

The record proves neither that Lenz harbored racial animus, nor that Lenz forced the Complainant off the articulated truck, nor that Lenz even contemplated firing him that Friday afternoon. Indeed, Lenz called him the following Monday morning because the Complainant was absent from work without explanation. After ascertaining his whereabouts, Lenz said the Complainant could begin working again immediately. The Complainant apparently refused, stating that certain problems still required Union intervention. Even assuming arguendo that the Complainant could somehow have perceived that Lenz was firing him, this mistaken perception would have been corrected when Lenz called him the following Monday morning. Rick Bolton, the Union agent with whom the Complainant spoke after having been replaced aboard the articulated truck, contacted Lenz, Monahan, Reuter, Ashmore and Trumm. Bolton confirmed not only that the Complainant consented when Lenz asked him about switching with Ashmore, but that Lenz never terminated his employment.

Finally, the Complainant reads too much into the fact that Lenz never specifically asked about his continued availability for work. Because the Complainant could not reasonably have concluded that Lenz was firing him, the fact that Lenz never asked about his continued availability says very little.

The Complainant next argues that neither seniority nor skillC the legitimate, nondiscriminatory reasons offered for changing articulated truck driversC actually motivated the Duncan/Ashmore switch. The Complainant makes several specific arguments here: (1) the Respondent informally favored long-term white employees; (2) neither Ashmore nor Reuter were necessarily more productive; (3) Ashmore should have been given the articulated truck from the beginning if the Respondent was really concerned with seniority and skill; (4) Ashmore had once damaged power lines while operating this very same equipment; and (5) Duncan had more seniority than Reuter, whom Lenz never approached about switching with Ashmore.

The first argumentC that the Respondent favored long-term white employeesC is especially problematic. The Complainant characterizes this policy inconsistently, without acknowledging that different characterizations convey different meanings. One cannot necessarily equate policies favoring A white, long-term employees@ with policies favoring A long-term employees, all of whom are white.@ The first characterization implies that the Respondent specifically favored white employees, while the second suggests that race meant something quite different. The Respondent clearly rewarded long-term employees with overtime and choice assignments. Without these rewards, construction firms could not retain their most experienced workers and would lose competitive advantage.

The remaining arguments fail because again, the record does not provide convincing support. Reuter and Ashmore had more experience driving articulated trucks, and the evidence suggests that while the Complainant performed well enough with this equipment, Reuter and Ashmore were more efficient. Efficiency was important because the articulated trucks were being moved off-site very shortly. Finally, neither the power line incident nor the fact that Ashmore was otherwise occupied while the Complainant spent several days aboard an articulated truck necessarily casts doubt upon whether Ashmore was indeed highly skilled with this equipment.

Regarding his corporate culture argument, the Complainant maintains that: (1) although the Respondent formally recognizes the importance of ensuring equal opportunity, the company unofficially favors white employees; (2) the Respondent mistreated another African-American employee; and (3) the Respondent has never employed more than three minority workers.

The evidence does not conclusively show that the Respondent intimidates and excludes black employees, nor does the evidence show that the company unofficially favors white employees. One cannot necessarily find discrimination against the Complainant solely because the Respondent has hired few African-American workers. The Respondent rewards long-term employees with overtime and select assignments. That few long-term employees have been African-American constitutes historical fact. However, this does not automatically point toward any present discriminatory environment. This case does not involve disparate impact, but rather disparate treatment. The Complainant has not proven disparate treatment.

The alleged mistreatment of another African-American employee requires similar speculation about discriminatory motives. The employee in question, Franklin Edmunds, was terminated after knocking down power lines with his articulated truck. Avery Ashmore committed this very same infraction, but was not terminated. The critical disparities between the Edmunds situation and the Ashmore situation are that Edmunds knew about the power lines beforehand, and had previously damaged company equipment after ignoring safety warnings.

Putting the record and arguments into a case law framework, the Complainant only establishes with definiteness the first element in a prima facie discrimination claim. Under the burden shifting process set forth in McDonnell Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), as amplified in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981), the Complainant must establish each element of a prima facie discrimination claim in order to shift the burden to the Respondent.

As indicated above, the Complainant only clearly establishes that he is African-American and by extension, of darker skin color than his coworkers. This is sufficient to demonstrate that he is a member of a protected class.

The second element of a prima facie claim is that the Complainant must have suffered an adverse employment action. The Complainant has asserted that he was required to forgo opportunities for overtime hours on September 28th and 29th, and that his employment was involuntarily terminated. As noted above, the record indicates that the Complainant need not have accepted the transfer from driving the articulated truck on September 28th. Giving the record, when viewed in its entirety, the most favorable reading for the Complainant, the Hearing Examiner can only conclude that the Complainant mistakenly believed he had no choice about giving up his seat. As for the contention that the Complainant believed he had been terminated, there is no credible evidence in the record to support such a conclusion. At most, the Complainant= s supervisor may have indicated that the Complainant had worked on the articulated truck for the last time. But the Hearing Examiner cannot stretch this into a belief that the Complainant had been terminated. The Complainant should have understood that, as a scraper operator, there would be more work for him. Even accepting the Complainant= s doubtful interpretation of his continued employment status, Lenz= s call the following Monday must have dispelled the Complainant= s belief. That the Complainant wished to pursue other claims in other forums does not override the fact that the Respondent wished him to return.

Even if the Hearing Examiner were to find that the Complainant had established the first two elements of a prima facie claim, the Complainant fails to carry his burden with respect to the final element, that of establishing a causal link between his membership in either of two protected classes and the allegedly adverse employment actions. The Hearing Examiner need not repeat the analysis from above. Simply put, the Complainant fails to point to evidence sufficient to establish by the greater

weight of the evidence that his race or color had anything to do with the events of September 28th and thereafter.

Even giving the Complainant the benefit of any and all inferences that one could possibly draw from the record, the Hearing Examiner finds that the Complainant has failed to establish a prima facie claim of employment discrimination under the Equal Opportunities Ordinance. On this record, even if the Complainant= s evidence and arguments could be read to establish a prima facie claim, the burden merely shifts to the Respondent to articulate some legitimate, nondiscriminatory reason for its actions. Pursuant to Burdine, supra, this burden is not one of proof, but rather of articulation. The Hearing Examiner finds that the Respondent= s proffered explanation is reasonable and sets forth a nondiscriminatory explanation of the events. Asking less senior employees to voluntarily permit more senior employees to take certain shifts or hours in order to retain the more senior employee does not demonstrate racial animus. For historical reasons, this process may favor white employees over employees of color, but this case was tried as one based on disparate treatment, not disparate impact.

The final step in the analysis is to determine whether the Respondent= s offered explanation is either not credible or mere pretext for an otherwise discriminatory motive. The Complainant fails to convince the Hearing Examiner that the Respondent= s witnesses or its explanation were not credible. There is simply nothing in the record to show that another discriminatory motive lurks behind that presented by the Respondent.

Before concluding, the Hearing Examiner must address the credibility of the witnesses. Generally speaking, the witnesses seemed eager to convey their understanding of the circumstances without bias or hidden agenda. The fact that many of the witnesses, including Lenz, Ashmore, the several James, and others may still have an employment or economic interest in the success of the Respondent did not appear to alter their testimony. Richard James seemed the most argumentative of the Respondent= s witnesses, and despite being co-owner of the company, the total affect of his testimony did not leave the Hearing Examiner with the impression that he was deliberately obscuring the truth. And although Rick Bolton seemed to suggest that perhaps he had not been quite as thorough as he might have, his testimony was not clearly incredible or defensive.

The Complainant= s testimony was likewise credible. The Hearing Examiner has no doubt that the Complainant feels deeply wronged by the Respondent and believes that much of his recent hardship should be laid upon its doorstep. Despite the sincerity of this belief, the Hearing Examiner is convinced that the facts compel another result.

The Hearing Examiner believes this complaint stems from a horrible misunderstanding on the part of the Complainant. Whether the Respondent might have done things differently to prevent this misunderstanding is irrelevant to the claim of discrimination, as presented herein. Clearly, the Complainant must accept some of the responsibility for his hardship, considering his failure to return to work after Lenz invited him back and after his union representatives advised him to return. The bottom line is that despite misunderstandings and failed opportunities on the part of both sides to have prevented the present situation, the record in this matter does not demonstrate any violation of the Equal Opportunities Ordinance.

The complaint is hereby dismissed.

Signed and dated this 22nd day of December, 2003.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner