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

Bobby L Woods 3327 Ambassador Dr Madison WI 53718 Complainant vs. Sara Lee Bakery 3401 E Washington Ave Madison WI 53704 Respondent	HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 20042176

This matter came before Madison Equal Opportunities Commission Hearing Examiner Clifford E. Blackwell, III on July 12, 2005. The Complainant, Bobby L. Woods, appeared in person. The Respondent, Sara Lee, appeared by Chris Archambault, Manager of Human Resources, and Attorneys Peter Albrect and Jennifer Cotner of Godfrey & Kahn 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, Bobby L. Woods, is an adult resident of the State of Wisconsin.

2. The Respondent, Sara Lee Bakery, is a Madison business and employer located at 3401 East Washington Avenue in Madison, Wisconsin.

3. Complainant is an African American. He is a native of the United States of America. Complainant's skin is Black.

4. Complainant was suspended from work on October 7, 2004 following an altercation with co-worker Hai Le. Complainant was paid all his scheduled work time for the day after being sent home on October 7, 2004. The total suspension period was four days.

5. Complainant missed a total of 16 scheduled hours of paid work during his suspension.

6. Supervisor Tom Campbell and Bread Production Manager Michael Henderson investigated the altercation between Hai Le and Complainant, as well as ancillary allegations raised by Complainant against Hai Le and Chaui Pham. Campbell and Henderson took statements from Woods and Le, and collected physical evidence, including a wrapper from a caramel apple containing peanuts in the trash near Woods' work area.

7. Sara Lee employees Chaui Pham and Hai Le are racially and/or ethnically Asian.

8. Along with the suspension, Respondent issued a corrective discipline action notice to Complainant's personnel file on October 11, 2004. The notice lists a four-day suspension, one day of which was paid suspension, and cites the violations as fighting or horseplay and dishonesty and eating an allergen in the plant production area. The notice indicates that any further disciplinary actions will involve termination.

9. Respondent has a practice of suspending employees involved in violence or threats of violence in the workplace. Employees Brian Ruhland and Mark Weber were each suspended for three days as a result of an incident of fighting or horseplay on June 21, 2005. Ruhland and Weber are both White.

10. Complainant has reported multiple examples of employees Chaui Pham and Hai Le violating company policies and/or harassing him. Employees were known to violate a written policy against cell phone use. Management issued a verbal warning but no written disciplinary action to Chaui Pham, who took unauthorized pictures of Complainant with a cell phone.

RECOMMENDED CONCLUSIONS OF LAW

1. Complainant is a member of the protected class race (African American).

2. Complainant is a member of the protected class color (Black).

3. Complainant is not a member of the protected class national origin or ancestry (African ancestry).

4. Respondent is an employer within the meaning of the ordinance.

5. Respondent did not violate the ordinance in that Respondent did not suspend or otherwise subject Complainant to adverse job actions or less favorable terms and conditions of employment on the basis of race, color, national origin or ancestry.

RECOMMENDED ORDER

It is hereby ordered:

1. The Complaint is hereby dismissed.

2. The parties shall bear their own costs.

MEMORANDUM DECISION

The Hearing Examiner addresses the question of whether the Respondent discriminated against the Complainant on the basis of race, color, or national origin/ancestry when Respondent suspended Complainant from work on October 7, 2004, causing Complainant to lose pay for 16 hours of scheduled work. The Complainant self identifies as African American and Black. Given the factual scenario and asserted arguments at hand, the Hearing Examiner finds it appropriate to combine the asserted bases of discrimination: race (African American/Black), and color (Black). In this Decision and Order, they will be evaluated as a race claim. Note that this combination of bases is dependent on the facts and arguments in this specific case, and not a generally applied procedure. In addition, since no facts emerged to suggest that the Complainant's national origin (African) was a factor in this matter, he is not a member of that protected class.

On October 7, 2004, Complainant was working in the bread production area of the Sara Lee bakery when, according to Complainant's testimony, co-workers Chaui Pham and Hai Le began making comments that annoyed the Complainant. The comments allegedly were along the lines of, "why are you working so many days?" or, "why are you working overtime?" Hai Le in particular allegedly continued to verbally needle Complainant. Hai Le testifies that Complainant next threw an apple container in the garbage and approached Hai Le. At this point, the Complainant's version of events begins to differ from that of Hai Le and Respondent. Both sides agree there was some type of approach and altercation. Complainant's testimony is that he "approached Hai Le with speed and yelling at Hai Le." Complainant goes on to say that Hai Le ran into a pole as he backed away from and pushed Complainant. In Hai Le's version, Complainant struck Hai Le in the face and jaw, leaving visible marks, as well as trace amounts of caramel and peanut residue on Hai Le's shirt.

Management became aware of the altercation almost immediately. Supervisor Tom Campbell alerted Bread Production Manager Michael Henderson. Henderson made an initial assessment that Complainant was the likely aggressor. Henderson sent Complainant home for the day with pay, in order to separate Complainant and Hai Le. Henderson and Campbell spoke with Complainant in the course of making the assessment, but did not take a statement from him on the day of the incident. Campbell and Henderson investigated and documented the incident by taking pictures of the relevant work area and the apple wrapper, which included caramel and peanuts. Campbell and Henderson wrote statements of their process and findings and also took statements from Hai Le and a co-worker in the area, Howard Rees.

Complainant's written statement, taken the day after the incident on October 8, 2004, includes his description of the altercation with Hai Le. It also includes background information about earlier incidents involving Hai Le and Chaui Pham. The earlier incidents essentially describe a series of mildly annoying or harassing verbal exchanges or taunts. Among other things, Complainant alleges that Hai Le and Chaui Pham have laughed at him, told him to go home, warned that they will get him fired, and taken Complainant's picture with a cell phone camera in violation of a company policy prohibiting cell phones in the workplace. The Complainant alleges that these incidents were not properly investigated or documented, and that, with respect to the cell phone incident at least, represent an example of disparate treatment. Essentially, Complainant asserts that other workers not of his race or color have violated company policies and not been subject to the same scrutiny or suspension as he was when he allegedly violated a company policy. Therefore, Complainant asserts that similarly situated employees outside his protected class have received more favorable treatment.

The Hearing Examiner will use the McDonnell Douglas/Burdine paradigm, McDonnell Douglas v. Green, 411 U.S. 792 (1973), Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), in evaluating this disparate treatment claim. Under this approach, the Complainant must first establish a prima facie claim of discrimination. In the present case, the elements of such a prima facie claim are membership in a protected class, an adverse employment action, and some reason to believe that there is a causal connection between the first elements. There is no dispute that the Complainant meets the first two elements of the prima facie case. He is Black/African American, unlike the other co-workers Complainant cites as being similarly situated, and he was suspended and given a disciplinary action letter in his employee file. However, it is less clear that the Complainant meets the requirement to demonstrate a causal link between his adverse employment action and his race. The burden on the Complainant is not an especially high one at this stage. Nevertheless, he must present enough evidence to permit a reasonable inference that the adverse employment action is causally related to Complainant's race. Complainant attempts to show that past alleged employee misconduct involving ethnically or racially Asian employees Hai Le and Chaui Pham demonstrates the Respondent's differing approach. Complainant makes a similar argument about the manner of the investigation and suspension of the October 7, 2004 incident. Complainant believes that the employer's refusal to take a statement from him on the day of the incident, as well as the fact that Complainant's word was given less credence in an incident that involved no witnesses other than the alleged victim and the Complainant, are indicative of discrimination based upon race.

The Hearing Examiner believes that the Complainant is not similarly situated to Hai Le and Chaui Pham with regard to the October 7, 2004 incident and previous alleged incidents. First, it is clear that the October 7, 2004 incident garnered a swifter and more thorough response than allegations that Complainant had previously made against Hai Le and Chaui Pham. Of course, the October 7, 2004 incident represents two serious allegations of employee misconduct. Violence, intimidation or threat of violence or intimidation in the workplace generally are much more serious allegations than an allegation that another employee is making annoying and harassing remarks or using a cell phone to take snapshots of Complainant. The second allegation, which is backed by at least some credible physical evidence, that of eating food which contains peanuts, in a food preparation area, is an even more serious allegation, as this poses a risk of food contamination by a well-known and potentially dangerous allergen (peanuts). The employer cannot and should not treat every incident or alleged incident the same. The Hearing Examiner believes that the employer did a relatively poor job of managing some of the earlier complaints of harassment and misconduct that Complainant made against Hai Le and Chaui Pham. The employer had Chaui Pham sign a copy of the cell phone policy. This is a reasonable response to an incident of unauthorized cell phone use, but probably could have been augmented by a brief conversation with Complainant and Chaui Pham regarding the need to get along in the future. The other incidents that Complainant reported, involving chiefly Hai Le, were apparently not substantially investigated and did not result in any disciplinary action or warning. In this manner, Respondent failed in nipping a developing problem, that of a somewhat unpleasant and contentious atmosphere, in the bud. Still, while Respondent's management of the previous incidents was less that ideal, it is still generally reasonable and certainly not indicative of racial bias. Rather, the Hearing Examiner believes that Respondent was simply responding to the relatively minor accusations in a proportional manner. A failure to dig deeper and root out underlying tensions is not great management, but it is also not a violation of the ordinance. As an aside, the previous incidents fall well short of those that would constitute a hostile work environment.

Additional evidence also shows Respondent's proportional response to past similar incidents. Respondent submitted the corrective action notices detailing three-day suspensions starting June 21, 2005 for Brian Ruhland and Mark Weber, two White employees who engaged in what the notices deem, "horseplay that resulted in a physical contact . . . a clear violation of company policy." A look at the allegations facing Ruhland

and Weber, versus the allegations against Complainant, seems to suggest that, all in all, Complainant was certainly not treated less favorably than these White comparators. Complainant received a longer suspension, but his alleged bad conduct was very likely more serious.

Because the previous incidents and the October 7, 2004 incident are dissimilar in important ways, the Complainant is not similarly situated to the employees who Complainant accused in his ancillary complaints. In essence, management has good reason to treat serious claims with greater scrutiny and discipline. Additionally, Complainant is not similarly situated to Hai Le with regard to the initial investigation of the October 7, 2004 incident. The initial determination of what occurred uncovered physical evidence of the Complainant acting with violence or threat of violence and eating an apple with peanuts and caramel in a food preparation area. Management stated that marks on Hai Le's face were more consistent with being struck by Complainant, which was the version that Hai Le offered, than with an inadvertent contact with a pole as Hai Le backed away in fear from the rapidly charging Complainant, in the version that Complainant put forth. Ultimately, this determination is not crucial, since the peanut evidence alone warrants Respondent's action. The same applies to the threat of violence part of the incident, even if Complainant's version is believed in its entirety. This is true since according to the Complainant's own version, he approached Hai Le in a fast and aggressive manner with the obvious intent or foreseeable effect of intimidating Hai Le. In sum, the Complainant has not presented sufficient evidence to demonstrate an inference that race is a motivating reason for Complainant's adverse employment action. He has not stated a prima facie case.

If, by demonstrating that similarly situated employees not of his race have received more favorable treatment, and that as a result, the Complainant had been able to demonstrate a causal link between his race and his adverse job action, the next step in the McDonnell Douglas/Burdine framework would have required the Respondent to offer a legitimate, non-discriminatory justification for its actions. This is merely a burden of production. That is, the Respondent's differing treatment of the ancillary incidents, and the October 7, 2004 incident stem from legitimate, non-discriminatory justifications like the business need to treat only serious complaints with thorough investigations and suspensions, if warranted. Respondent's conduct and arguments would meet this burden, and act as a rebuttal to the presumption created by the finding of a prima facie case. This same reasoning applies to the need to treat an employee believed to be the perpetrator of a violent threat or incident differently from an employee who is the recipient of such threats, as well as the choice to believe Hai Le's version of the incident, which was backed by credible physical evidence.

The final step of the McDonnell Douglas/Burdine analysis is the pretext stage. Here, a Complainant is able to overcome a Respondents proffered justification by showing that such justification is not the Respondent's true justification. This is a burden of persuasion. In short, had this matter advanced to this stage, the Complainant would not been able to prevail since he has not presented evidence or raised any credibility questions that could overcome Respondent's proffered non-discriminatory justification. The record simply contains little to nothing that casts doubt on the employer's proffered justification or causes the Hearing Examiner to question the credibility of Respondent or its witnesses.

The Hearing Examiner accepts the frustration of the Complainant with regards to Respondent's failure to seriously investigate Complainant's prior reports of co-worker harassment. However, on this record, the Hearing Examiner cannot find sufficient evidence to establish that it has discriminated against the Complainant. Respondent is left with at least three employees who work in an environment that seems to be less than inviting and conflict-free, even if it is not a workplace characterized by unlawful discriminatory conduct. It is clear that Respondent is faced with an area for improvement when it comes to managing and preventing conflicts.

Signed and dated this 25th day of April, 2006.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner

cc: Peter L Albrecht