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

Adam Vance 3301 Quincy Avenue Madison, WI 53704 Complainant vs. Eastex Packaging 4201 Lien Road Madison, WI 53704 Respondent	RECOMMENDED DECISION Case No. 20107

A complaint was filed on July 1, 1983 with the Madison Equal Opportunities Commission (MEOC) alleging discrimination on the basis of race in regard to employment. Said complaint was investigated by Mary Pierce of the MEOC staff, and an Initial Determination dated December 15, 1983 was issued concluding that probable cause existed to believe that discrimination had occurred or was occurring as alleged.

Conciliation failed or was unsuccessful and the case was certified to public hearing. A hearing was held commencing on January 15, 1985. Atty. Randall Aronson of JULIAN & OLSON, S.C. appeared on behalf of the Complainant who also appeared in person. Atty. Phoebe Eaton of LINDNER, HONZIK, MARSACK, HAYMAN& WALSH, S.C. and employee-representative Al Kuehl appeared for the Respondent. Based on the record of the hearing, and upon consideration of the post-hearing briefs submitted by the parties, the Examiner enters the following Recommended Decision:

RECOMMENDED FINDINGS OF FACT

1. The Complainant, Adam Vance, is a black, adult male residing in the State of Wisconsin.
2. The Respondent, Eastex Packaging, Inc. (hereinafter, "Eastex") is an employer doing business in the City of Madison.
3. The Complainant was hired by Eastex as a general laborer on January 11, 1979.
4. Vance was later promoted to the position of gluer operator and then to die maker.
5. The Complainant, during the term of his employment with the Respondent, was represented by Local 1202 of the United Paper Workers Union (hereinafter, "the union") which had a collective bargaining agreement with Eastex.
6. The Complainant was supervised by Bud Pollock, a white male, during the term of the Complainant's employment at Eastex.
7. At the time Vance applied for the position of diemaker, sometime in 1981 or earlier, Vance was asked to submit a resume. Other employees, including whites competing for the same position, were also asked to submit a resume. Vance filed a grievance with the union, and the employer subsequently dropped its request for a resume. Resumes were not ordinarily required to be submitted with applications for promotions. Vance did receive the promotion to diemaker he had applied for.

8. On May 29, 1981, Vance received a telephone call from the mother of his daughter who had called to inform him that his daughter had been in a bicycle accident and was receiving medical attention. As a policy, Eastex employees generally were allowed two to three minutes to receive a call or they were to call back on their lunch hour. Pollock, who was not aware of the nature of Vance's call, approached Vance after he (Vance) had been on the phone about three minutes and inquired why Vance was taking so long. Vance responded by shouting obscenities at Pollock. During the verbal exchange that followed, Pollock called Vance a "boy."
9. Vance grieved the May 29, 1981 incident through the union. In response to the grievance, Eastex set up a meeting between Vance and Pollock. The resolution was that both men would attempt to get along better with each other in the future.
10. Sometime in the fall of 1982, while Vance was working in the die room, Pollock came up from behind Vance suddenly and startled him. Vance jumped and Pollock said something to the effect of, "I scared you, didn't I?" Pollock then asked what Vance would have done had it been a snake that had scared him. Vance replied that he would have "run like hell." Pollock then replied that all he (Pollock) would have seen would have been "a black streak of shit." Vance reported the incident to the union president, John Vellardita.
11. Vance had elective foot surgery twice during his terms of employment at Eastex. He first missed work because of foot surgery from July 6, 1981 to October 29, 1981. He later missed work because of foot surgery from August 16, 1982 until November 15, 1982. Each of these periods of work missed was considered as one unexcused absence or "occurrence" (a total of two occurrences) for all the time he missed due to elective foot surgery.
12. Vance was counseled by Eastex for absenteeism in February of 1982. Vance requested Vellardita to be the union representative at the counseling session. The employer had previously designated someone else to be Vance's union representative and the employer attempted to forcibly prevent Vellardita from entering the meeting room. Vellardita did make his way into the room and represented Vance at the counseling session.
13. Vance received a counseling session for absenteeism after 12 occurrences in a twelve-month period. Warren Copus, a white employee, received a counseling session for absenteeism after 22 occurrences in a twelve-month period. Wayne Cooper, a Native American employee, received a counseling session for absenteeism after seven occurrences in a twelve-month period.
14. On November 17 of 1982, after Vance had returned to work from his second elective foot surgery, he was approached around 1:20 a.m. by fellow worker Michael Kavanaugh. Kavanaugh related to Vance that Pollock had said, during the course of an earlier conversation with Kavanaugh, "when are you going to paint your skin with shoe polish like your brother." Both Kavanaugh and Vance understood Pollock's statement to refer to Vance. Vance finished the shift which lasted until 7:00 a.m. and did not return to work after that.
15. On November 18, 1982, Vance called in to Eastex and stated that he was taking off work because his babysitter was in an auto accident.
16. Vance missed work on November 19, 22, and 23 of 1982 without calling in or otherwise notifying Eastex.
17. On November 24, 1982, Eastex sent Vance a notice terminating his employment. A copy of said termination notice was hand-delivered to Vellardita the same day.
18. The Complainant was terminated pursuant to Article XV, Section Three of Eastex's collective bargaining agreement with the union which stated:

    An employee shall lose his seniority and rights if he . . . is absent for three (3) consecutive working days, without notice to the company, and without justifiable cause for such lack of notice.

19. Vance met with company officials on or after November 29, 1982 and also filed a labor grievance. The company did not find justifiable cause for Vance's lack of notice and upheld the termination. The grievance was eventually withdrawn.
20. The Complainant was discriminatorily verbally harassed on the basis of his race by his supervisor, Bud Pollock.
21. Other than as described in Finding of Fact 20 (above), the Complainant's race was not a factor in any other terms or conditions of his employment with the Respondent at issue in this case (including job placement and/or compensation).
22. The Complainant's race was not a factor in his discharge from employment by the Respondent.

RECOMMENDED CONCLUSIONS OF LAW

1. That the Complainant is a member of the protected class of race within the meaning of Sec. 3.23, Madison General Ordinances.
2. That the Respondent is an employer within the meaning of Sec. 3.23, Madison General Ordinances.
3. That the Respondent did not discriminate against the Complainant on the basis of race in regard to any of the following:

   (a) compensation;
   (b) job placement; and/or
   (c) termination (discharge).

4. That the Respondent discriminated against the Complainant on the basis of race in regard to conditions of employment; specifically, in regard to the verbal harassment of the Complainant by his supervisor, Bud Pollock.

RECOMMENDED ORDER

1. That all issues referred to in Conclusion of Law 3 shall be and hereby are dismissed.
2. That the Respondent shall cease and desist from discriminating against the Complainant on the basis of race as described in Conclusion of Law 4.
3. That the Respondent, for a period of one year, shall post a copy of the Madison Equal Opportunities Ordinance in a conspicuous location at its Madison facility and shall allow the MEOC or its designees to verify compliance with this order by on-site inspection and/or as otherwise deemed appropriate by the EOC Executive Director.
4. That the Respondent shall allow the MEOC to make a one-hour presentation on preventing racial harassment to its supervisory personnel, including - but not limited to - Bud Pollock, at a time and place agreeable to the MEOC and to Eastex.
5. That the Complainant shall not be entitled to any attorney fees or costs.

MEMORANDUM OPINION

The Complainant raised a variety of substantive issues in this case. He raised a claim of race discrimination in regard to compensation, but at hearing presented no persuasive evidence on the issue. He raised a claim of race discrimination in regard to job placement, but also presented no persuasive evidence on this issue.

Vance did, however, present evidence to show that he had on three occasions been verbally harassed in a racially discriminatory manner by his supervisor, Bud Pollock. Vance also presented evidence to

show that due to his race he had once been counseled for absenteeism far earlier than a white employee (Warren Copus) was.

The Complainant did not show, however, that the employment conditions at his workplace were of a sufficiently oppressive nature - in terms of racially discriminatory practices - to warrant his combined failure to report to work and to call in for three consecutive days, an infraction of the collective bargaining agreement for which he was terminated.

A. Racial Harassment

The Federal courts have tended not to find an employer liable for racial harassment under Title VII (Title 42 U.S.C. Sec. 2000 e, ets eq.) unless more than a few isolated incidents (racial epithets and the like) have occurred.[1] While the application of the local ordinances (Sec. 3.23, Madison General Ordinances) is not bound by Title VII precedents, certainly those federal precedents should be considered.

However, after consideration of those federal precedents, I nevertheless find liability in this case. The reason is that even isolated incidents of harassment, particularly when engaged in by a supervisory employee as in this case, adversely affects the psychological well-being of an employee because of his or her race. And since more than twenty years have already elapsed since the passage of Title VII and the local ordinance, there simply is no longer an excuse for supervisory personnel to engage in even isolated incidents of racial harassment in the workplace.

However, the frequency and degree of harassment may obviously be considered in fashioning an appropriate remedy, as is the case here.

The Complainant presented direct evidence to show that he was verbally harassed by Bud Pollock on what turned out to be the Complainant's last day of work. Pollock, a white male, said to Mike Kavanaugh, a white male, "when are you going to paint your skin with shoe polish like your brother." Pollock's "shoe polish" statement was repeated by Kavanaugh to Vance at 1:20 a.m. on November 17, 1982, after Kavanaugh had heard it from Pollock.

Kavanaugh and Vance both understood the remark to be a racial statement referring to Vance. Pollock, pursuant to a company investigation, initially denied making the "shoe polish" statement and later attributed the statement to another white employee, Ken Smith. Kavanaugh testified that Pollock had made the statement and Smith testified that he (Smith) had not made the statement.

I find Kavanaugh's and Smith's testimony more credible than Pollock's, particularly because Pollock first denied making the statement and later attempted to attribute it to someone else.

Vance also presented evidence of two earlier racial remarks by Pollock, one that occurred on May 29, 1981 and another that occurred in the fall of 1982 but prior to November 17, 1982. The May 29, 1981 incident resulted in Pollock calling Vance a "boy," and the fall of 1982 incident resulted in Pollock referring to Vance as a "black streak of shit."

Pollock does not deny that the May 29, 1981 incident occurred, but claims the "boy" remark was not intended racially. The "boy" remark was made during an exchange in which Vance shouted obscenities at Pollock after Pollock had interrupted Vance during an emergency phone call about his (Vance's) daughter. Nevertheless, I find Pollock's use of the term "boy" was made in a racially

derogatory context. The fact that Vance had shouted obscenities at Pollock prior to Pollock making the racially derogatory remark may be considered a mitigating factor, however.

Pollock denies making the "black streak of shit" statement in the fall of 1982. I find, however, Vance's recall of the statement to be credible, particularly because Vance contemporaneously reported the statement to Vellardita, the union president.

Additionally, Vance presented evidence that he had been counseled for absenteeism after 12 occurrences, while a white employee had not been counseled until he had accumulated 22 occurrences. Further, a Native American employee had been counseled for absenteeism after 7 occurrences. Vance thus established that minority employees, himself and a Native American, had been counseled for absenteeism more strictly than a white employee had been.[2]

Vance was unsuccessful, however, in showing racial motivation in two other instances: the resume requirement when he applied for a die maker's job and the employer's resistance to allowing Vellardita to assist him (Vance) at a disciplinary counseling session.

The employer presented testimony that others, including whites, who sought the die maker position were required to submit a resume. Vance did not refute this evidence, nor otherwise showed pretext for race discrimination in regard to the resume requirement. As for the Vellardita incident, the employer presented testimony that it did not oppose union representation for Vance at the disciplinary session. The employer contends that it resisted Vellardita because the employer had designated another representative for Vance. While the employer's reason appears to be questionable, Vance again failed to persuasively refute it or to otherwise show pretext for race discrimination in regard to the Respondent's resistance of Vellardita. Vellardita was allowed to stay and assist Vance once he (Vellardita) had forced his way into the meeting room where the disciplinary session was to take place. It is the Complainant's burden to show that the Vellardita incident was more than simply a dispute about who could represent Vance (i.e., it is the Complainant's burden to show race discrimination) and the Complainant failed to meet his burden of proof.

B. Discharge from Employment

Vance has established four racially motivated acts which he endured during the course of his employment with the Respondent. In May of 1981, Pollock called Vance a "boy" in the heat of an argument where Vance had been shouting obscenities at Pollock. In February of 1982, Vance was counseled for absenteeism after twelve occurrences although a white employee had received 22 occurrences before being counseled. In the fall of 1982 (but prior to November 17), Pollock referred to Vance as a "black streak of shit." On November 17, 1982, Pollock said to a white co-employee of Vance's, "when are you going to paint your skin with shoe polish like your brother" in reference to Vance. Pollock's remark was repeated to Vance by the white co-employee.

These four racially motivated acts were obviously harassing and disturbing to Vance. The legal question here, however, is whether or not the four incidents in combination rise to the magnitude required to justify Vance's absence without calling to notify the Respondent's workplace. The day after the "shoe polish" statement, Vance did call (November 18, 1982), and indicated to the employer he was taking time off because his babysitter had been in an accident. Vance then missed the next three work days - November 19, 22, and 23, 1982. Vance was terminated on November 24 in accordance with the collective bargaining agreement. Vance claims he did not come to work because he was angered by Pollock's "shoe polish" statement and afraid he would hurt Pollock.

Even if all the facts were construed in the Complainant's favor and the four incidents were said to be more than mere isolated incidents[3] and were said to be evidence of intolerable working conditions warranting Vance's absence from work, Vance's failure to call on November 19, 22, and 23, after he had called on November 18, is inexplicable.

I, therefore, need not even reach the issue of whether the four acts warranted Vance's absence. Even if Vance were given all the benefit of the doubt, he would not prevail on the discharge issue because he cannot justify his failure to call in.

In summary, Vance was verbally harassed by Pollock, his supervisor, on the basis of his (Vance's) race. However, Vance did not establish that the working conditions were so intolerable that he was warranted to be absent from work without calling for three consecutive days. It is important to note that Vance was not terminated merely for being absent, but also for his failure to call in. Vance could have escaped termination had he called in and could have still taken up the issue of whether his absences were excusable while he was still employed.

ATTORNEY FEES AND COSTS

Although a successful Complainant may be entitled to reasonable attorney fees and costs, even where the Complainant succeeds only on less than a majority of the central liability issues, in this case, I find the Complainant is not entitled to attorney fees or costs for the following reason:

> The harassment issue was tied directly to the discharge issue. The discharge issue was one of the central liability issues. The Complainant's evidence of harassment was far short of the magnitude necessary to also carry the discharge issue.

Although finding in the Complainant's favor on the harassment issue, to also award costs and attorney fees would be improper. The only issue on which the Complainant prevailed in this case was the harassment issue, and that issue was intimately tied into the discharge issue which was really one of three central liability issues. The other two central liability issues were the compensation issue and the job assignments issue.

A complainant may recover attorney fees even if s/he prevails on less than a majority of the central liability issues,[4] and a prevailing complainant is generally presumed to be entitled to those attorney fees.[5] However, where as here the Complainant has failed to prevail on any of the central issues, the Complainant may be denied attorney fees although it has received a favorable ruling on an issue related to but not itself one of the central liability issues.[6]

Signed and dated this 21st day of May, 1985.

EQUAL OPPORTUNITIES COMMISSION

Allen T. Lawent
Hearing Examiner

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[1]Gilbert v. City of Little Rock, Arkansas, 722 F. 2d 1390 (1983), Johnson v. Bunny Bread 646 F. 2d 1250 (1981), Cariddi v. Kansas City Chiefs Football Club, 568 F. 2d. 87 (1977).

[2]Vance, a black, and Cooper, a Native American were counseled for absenteeism after having had significantly fewer occurrences than Copus, a white (see Finding of Fact 13). While it is not always appropriate to group minorities (such as blacks and Native Americans) as one classification, in this case it is appropriate and essential to the Complainant's argument to compare the treatment of whites to the treatment of minorities in general (even though the minority employees were of different races).

[3]EEOC v. Murphy Motor Freight Lines, Inc., 488 F. Supp. 381, 22 FEP 892 (1982).

[4]Uvideo v. Steve's Sash and Door Co., 36 EPD par. 35, 025 (1985).

[5]Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 98 S. Ct. 694 (1978).

[6]Uvideo v. Steve's Sash and Door Co., 36 EPD par. 35, 025 (1985); Commonwealth Oil Refining Co. v. EEOC, 33 EPD par. 33, 975 (1983).