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

Billy Sanders 207 West Washington Avenue, # 210 Madison, WI 53703 Complainant vs. U-Haul Company of Western Wisconsin 602 West Washington Avenue Madison, WI 53703 Respondent	RECOMMENDED DECISION Case No. 20288

An "Interim Recommended Decision" dated May 22, 1985 was issued by the Examiner in the above-entitled matter. A cover letter was sent along with said "Interim Recommended Decision" setting up a timetable for the Complainant to submit its bill for attorney fees and costs and allowing the Respondent an opportunity to submit its response.

The Complainant submitted its bill for attorney fees and costs which was dated June 5, 1985 and received at the EOC offices on June 6, 1985. The Respondent has not submitted a response to the Complainant's bill.

The Examiner, therefore, enters the following Recommended Decision:

RECOMMENDED FINDINGS OF FACT

The "Interim Recommended Findings of Fact" contained in the attached "Interim Recommended Decision" (dated May 22, 1985) are hereby incorporated in their entirety and shall stand as the Recommended Findings of Fact.

RECOMMENDED CONCLUSIONS OF LAW

The "Interim Recommended Conclusions of Law" contained in the attached "Interim Recommended Decision" (dated May 22, 1985) are hereby incorporated in their entirety and shall stand as the Recommended Conclusions of Law.

RECOMMENDED ORDER

A. Item 4 of the "Interim Recommended Order, contained in the attached "Interim Recommended Decision" (dated May 22, 1985), is hereby deleted and the following is substituted therefor:

4. That the Respondent shall pay to the Complainant all reasonable costs and reasonable attorney fees which the Complainant has incurred in maintaining and litigating this administrative complaint. The amount of reasonable costs and reasonable attorney fees which the Complainant has thus far incurred is as follows:

a. One Hundred Ten Dollars and Forty-Three Cents ($110.43) in reasonable costs;

b. Four Thousand and Seven Hundred and Sixty-Two Dollars and Fifty Cents ($4,762.50) in reasonable attorney fees.

B. That the "Interim Recommended Order" (Items 1 through 7) contained in the "Interim Recommended Decision" (dated May 22, 1985) and as subject to the modification (of Item 4) above is hereby incorporated in its entirety and shall stand as the Recommended Order.

OPINION

The "Memorandum Opinion" contained in the "Interim Recommended Decision" is hereby incorporated in its entirety into this Opinion. I also add the following:

IV. Attorney Fees and Costs

The Respondent has offered no challenge to the reasonableness of the Complainant's bill for attorney fees and costs (dated June 5, 1985). The seventy-five dollar per hour rate and the 63.50 total hours of time contained in the Complainant's bill for work through May 31, 1985 in litigating this administrative complaint do not appear to be clearly unreasonable. And in the absence of any challenge by the Respondent to any specific items of fees or the bill in total, I have granted the requested award of attorney fees: $75/hr. x 63.50 hours = $4,762.50.

Similarly, the costs contained in the Complainant's bill (dated June 5, 1985), totalling $110.43, do not appear to be clearly unreasonable. And in the absence of any challenge by the Respondent to any specific items of costs or the bill in total, I have granted the requested award of costs.

Signed and dated the 28th day of June, 1985.

EQUAL OPPORTUNITIES COMMISSION

Allen T. Lawent
EOC Hearing Examiner

May 22, 1985

Atty. Simon Karter
KELLY, HAUS, & KATZ
121 East Wilson Street
Madison, WI 53703

Timothy G. Netz, President
U-Haul Company of Western Wisconsin, Inc.
22 Atlas Court
Madison, WI 53711

Subject: Sanders vs. U-Haul Company of Western Wisconsin, Inc., #20288: Attorney Fees and Costs

The attached Interim Recommended Decision is not appealable to the Commission until such time as the Examiner has made a determination regarding what reasonable attorney fees and costs, if any, the Complainant is entitled to.

The Complainant must file at the EOC office and serve upon the Respondent a bill for attorney fees and costs no later than (15) days from receipt of this letter by Complainant's counsel. The Respondent then has fifteen (15) days from receipt of said bill to file and serve its response.

You will subsequently be notified of the examiner's ruling and when the appeal time for all issues begins to run.

The parties are encouraged to attempt to resolve this case without further proceedings, if possible. To that extent, the parties and/or their attorneys are requested to discuss this matter prior to the submission of the Complainant's bill for attorney fees and costs.

Allen T. Lawent
EOC Hearing Examiner

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

Billy Sanders 656 Oakwood Avenue Columbus, OH 43205 Complainant vs. U-Haul Company of Western Wisconsin 602 West Washington Avenue Madison, WI 53703 Respondent	INTERIM RECOMMENDED DECISION Case No. 20288

A complaint was filed on April 23, 1984 with the Madison Equal Opportunities Commission (MEOC) alleging discrimination on the basis of race in regard to employment.

Said complaint was investigated by a member(s) of the MEOC staff and an Initial Determination dated September 28, 1984 was issued concluding that no probable cause existed to believe that the Complainant had been discriminated against in regards to terms or conditions of employment and that probable cause existed to believe that the Complainant had been discriminated against in regard to discharge from employment.

The Complainant did not (timely) appeal the issues on which no probable cause was found. As a result, only the discharge issue (on which probable cause was found) remained. Conciliation failed or was waived, and the matter was certified to public hearing. A hearing was held commencing on February 21, 1985. Atty. Simon Karter of KELLY, HAUS AND KATZ appeared on behalf of the Complainant, who also appeared in person. Timothy G. Netz, the Respondent's president, appeared on behalf of the Respondent. Mr. Netz is not an attorney. He was assisted by Conrad Clark, a former officer-employee for the Respondent. Mr. Clark is also not an attorney.

Based upon the record of the hearing, the Examiner enters the following Interim Recommended Decision:

INTERIM RECOMMENDED FINDINGS OF FACTS

1. Billy Sanders is a black, adult male.

2. The Respondent, U-Haul Company of Western Wisconsin, Inc., is an employer doing business in the City of Madison, State of Wisconsin.

3. The Complainant began working for the Respondent as a packer/loader on February 17, 1984. The Complainant was hired at and employed out of the Respondent's City of Madison location at 602 West Washington Avenue. The Respondent has two other Madison locations.

4. The Complainant was warned by Jim Willey and/or Conrad Clark on several occasions that he needed to work in uniform. During the time the Complainant was employed by the Respondent, Willey was a program manager for the Respondent and Clark was the Respondent's president.

5. The Complainant had more furniture moving experience than a number of other of the Respondent's newly hired employees and the Complainant was asked by a salesperson for the Respondent, on at least one occasion, to show a less experienced employee some moving techniques.

6. On April 19, 1984, the Complainant timely reported to work at 7:00 a.m. at the Respondent's 602 West Washington Avenue location. The Complainant, along with other employees who had arrived, had to wait an hour or so until a person with keys appeared so that work could begin.

7. A group of five Madison employees and four employees from the Respondent's Janesville office were scheduled to do work in Sauk City on the morning of April 19. The Complainant was one of the employees scheduled to go to Sauk City.

8. The Complainant was asked by Chuck Jackson, the Respondent's dispatcher, to remain behind and help to unload a truck before proceeding to Sauk City. Jackson is a black male. Other than Jackson and Sanders, all other employees referred to in these Interim Findings of Fact are not black.

9. After unloading the truck, the Complainant proceeded to leave for Sauk City around 9:15 a.m. Jackson was scheduled to drive along, but remained in Madison. Prior to Sanders leaving, seven employees and three trucks had already gone to Sauk City.

10. The Complainant became lost and could not immediately find the Sauk City worksite. He called the Madison office and talked to Willey who assisted him with directions.

11. The Complainant arrived at the Sauk City worksite around 10:15 a.m.

12. Mark Patterson, a white male, also had gotten lost in one of the trucks that preceded Sanders going to Sauk City.

13. Upon his arrival, the Complainant spoke with Jim Bade, a white male, who was in charge of the work at Sauk City. Bade assigned Sanders to work in an area removed from the main worksite. Sanders assisted Patterson in dismantling some very large shelves.

14. After working for approximately an hour, Sanders and Patterson were approached by Bade. Bade said they were working too slowly. Bade also said there would be no break for lunch. Bade and the Complainant engaged in a verbal argument mostly over the issue of the lunch break. Bade told Sanders he was being taken "off the clock." Sanders thought he was being discharged.

15. Sanders walked away from the worksite and telephoned Madison. He talked to Clark who promised to provide Sanders with a ride back to Madison.

16. Sanders then went to a grocery store, purchased a couple of sodas and some food to munch on. He returned to the worksite, gave a soda to Patterson and remained in the area until he (Sanders) received a ride back to Madison. Before they left, Sanders offered Patterson some suggestions about the work he was doing. Sanders also drove some of the way back to Madison because he (Sanders) was nervous about Patterson's driving.

17. Sanders was terminated based on a conversation which Clark had with Bade on April 19, 1981, sometime after Bade had told Sanders he (Sanders) was "off the clock". Based on Clark's conversation with Bade, Clark wrote up the following termination report (see Respondent's Exhibit 1) about Sanders:

- Released from work at job location Sauk City, Wisconsin by Jim Bade crew chief
- Sanders late, came unfit to work, did not work to capacity. Uncooperative attitude stated "No way, I'm not going to do this", "I'm taking truck and leaving".
- Sanders not suited for job
- Terminated prior to 90 day probation

By "unfit for work," the Respondent meant Sanders had a hangover or had been drinking alcohol.

18. Sanders was not drinking alcohol and did not have a hangover while at work on April 19, 1984. Sanders was not late for work and performed his work adequately while at work on that day.

19. Prior to Sanders termination, a white employee named Sandy had been accused by other employee(s) of smoking marijuana in one of the Respondent's trucks while on duty. After a discussion with Willey during which the white employee denied smoking the marijuana, Willey determined that a credibility issue existed. The white employee was not discharged.

20. Prior to officially terminating Sanders, Clark did not give Sanders an opportunity to rebut Bade's version of the occurrences of April 19, 1984 comparable to the opportunity given to the white employee to rebut accusations of smoking marijuana.

21. But for the occurrences on April 19, 1984 and Clark's reliance on Bade's version of what had occurred, the Complainant would not have been terminated by the Respondent.

22. The Complainant was discriminated against on the basis of his race in regard to discharge in that his race was a substantial motivating factor, though not the sole motivating factor, in the Respondent's decision to discharge him.

INTERIM RECOMMENDED CONCLUSIONS OF LAW

1. The Complainant is a member of the protected class of race within the meaning of Sec. 3.23, Madison General Ordinances.

2. The Respondent is an employer within the meaning of Sec. 3.23, Madison General Ordinances.

3. The Respondent discriminated against the Complainant on the basis of race in regard to discharge from employment, in violation of Sec. 3.23, Madison General Ordinances.

INTERIM RECOMMENDED ORDER

1. That the Respondent cease and desist from unlawfully discriminating against the Complainant on the basis of his race.

2. That the Respondent reinstate the Complainant to the next available position as a packer/loader at one of its City of Madison locations.

3. That the Respondent pay to the Complainant all amounts he would have earned had he not been discriminatorily discharged from April 20, 1984 until such time as he is reinstated pursuant to Order #2, above. These provisions are intended to include both back pay and front pay, less any ordinance setoffs.

4. That the Respondent shall pay to the Complainant all reasonable costs and reasonable attorney fees which the Complainant has incurred in maintaining and litigating this administrative complaint.

5. That the Complainant shall be reinstated with all rights, benefits and perquisites of employment - including, but not limited to, seniority as if the Complainant had not been discharged on April 19, 1984.

6. That the Complainant shall be immediately eligible for any and all insurance benefits to which he would be entitled had he not been discharged on April 19, 1984.

7. That the Complainant shall receive interest at the rate of 12% on all amounts which he is due pursuant to Order #3 (above) from the time such amount would have become due, had he not been discriminatorily discharged, until the time the amount is actually paid.

MEMORANDUM OPINION

L. Standard of Proof

Once a hearing has proceeded to completion, the focus is on whether the Complainant has met his ultimate burden (as opposed to his interim burden) of proving discrimination.[1] In this case, the ultimate issue is whether or not the Complainant has proved by a preponderance of the evidence that race was a motivating factor in his discharge.

To prevail, the Complainant's race need not be the sole motivating factor in his discharge.[2] Nor is the Complainant required to show that he would not have been discharged "but for" his race.[3] To establish the employer's liability, the Complainant is required to prove (as stated above) by a preponderance of the evidence that race was a motivating factor in his discharge.[4] If liability is thus established, any evidence that the employer has regarding whether the Complainant would have been discharged anyway is a factor that can be considered in fashioning the remedy.[5]

II. Evidence

The Complainant may prove his case by using direct and/or circumstantial evidence. In this case, the Complainant's evidence of discrimination was purely circumstantial. The evidence establishes that:

(a) The Complainant, Sanders, is a black, adult male;

(b) Sanders was employed by the Respondent as a packer/loader out of its City of Madison location;

(c) On April 19, 1984 Sanders was working for the Respondent on a project in Sauk City, Wisconsin;

(d) Sanders was not late for work on April 19, 1984;

(e) While at work, on April 19, 1984, Sanders was not drunk or hung over from drinking alcohol;

(f) Sanders was performing his job adequately on April 19, 1984;

(g) The employer discharged him essentially for being late, for being hung over or drunk at work, and for engaging in an argument with crew chief Jim Bade, a white male;

(h) That the Complainant did engage in an argument with Bade;

(i) That the Respondent's president, Conrad Clark, a white male, discharged Sanders based on Bade's version of the occurrences of April 19, 1984 without affording Sanders a comparable level of pre-termination process that had been afforded to a white employee accused of smoking marijuana in one of the employer's trucks.

The circumstances which give rise to the finding of race discrimination are primarily two:

(a) Bade's version of the occurrences in Sauk City on April 19, upon which the Respondent relied in terminating Sanders, lacks credibility in essential detail except insofar as Bade and Sanders engaged in a verbal dispute;

(b) The employer did not allow Sanders a comparable opportunity to rebut Bade's version of the story to what a white employee had previously been allowed when accused by other employees of smoking marijuana.

Bade's version of the occurrences of April 19, 1984 is that he and three other workers from Janesville went to Madison to meet up with five employees from Madison. All nine were then to proceed to Sauk City. Altogether, four trucks and nine workers were to go to Sauk City. Because one of the trucks in Madison was still loaded from the previous day, Sanders and Jackson stayed behind to unload it.

Sanders arrived in Sauk City around 10:15 a.m., according to Bade, and,

". . . he looked a mess. His shirt was off, he was munching on a giant size bag of Cheetos and he smelled to me like he was drinking wine. Very, very much so. His attitude was such that he was under the influence of I-what I believe to be alcohol . . ."

Sometime in the next hour, one of the Madison workers (Bade does not remember his name) came by and indicated that Sanders did not appear to be doing anything. Bade walked over to where Sanders was working and saw Billy "holding up a wall . . . just leaning against the wall not doing anything."

Bade said he assumed Sanders was taking a rest, and Bade left to do something else. Bade carne back about 45 minutes to an hour later and claims he saw Sanders in the same position (leaning against a wall not doing anything). Bade claims he then took Sanders aside so he (Bade) could talk to Sanders alone, that he (Bade) began discussing with Sanders that Sanders had not been working and that Sanders "went completely off kilter right then and there." Bade said the vice president of the Sauk City Bank was close by and observed the whole thing, and that Sanders started yelling, ". . . and his exact words to me were I am not going to be your pussy and you're not gonna treat me like this."

Bade testified he then told Sanders he was off the job, but that he did not terminate Sanders employment at U-Haul.

Although Bade's version of what happened prior to Sanders arrival at Sauk City is generally consistent with other testimony given in this case, the Complainant established that Bade's testimony that Sanders had been drinking (disputed by the testimony of Jackson and Patterson) and Bade's testimony that Sanders was not working (disputed by the testimony of Groene and Patterson) is not credible.

Bade's version is also not credible in other ways. Patterson's testimony is that Bade and Sanders argued no more than six feet away from where Patterson was working (Bade testified he had taken Sanders aside to talk to Sanders alone) and that Bade and Sanders argued mostly about the lunch break (whereas Bade denies he ever indicated there would be no lunch break).

III. Dual Motive

A final analysis of the evidence leads me to the conclusion that Sanders' race was a substantial and determining factor in his discharge. While clearly a "mixed-motive" case, the Wisconsin Supreme Court has recently affirmed the position it had earlier taken in labor cases that an illegal motive need not be the sole motive for a complaining party to prevail; it is sufficient that the illegal motive be a determining motive relied on by the Respondent even where the Respondent also relied on some legitimate motives.[6]

In this case, the Respondent had on several occasions warned Sanders about not being in proper uniform.[7] It is clear, however, from Clark's own testimony that but for the occurrences of April 19, 1984 Sanders would not have been terminated. Clark relied entirely on Bade's version of what transpired in Sauk City. The Complainant has successfully discredited Bade's version of what happened in Sauk City except for the verbal argument that precipitated in Bade telling the Complainant he was "off the clock."

The Complainant has presented evidence that he was not "late," and Clark, in his testimony, essentially agreed with the Complainant on that issue. The Complainant has presented evidence to show that he was not drunk or hung over and that he was working and not "holding up a wall."

The Complainant also presented evidence that a white employee, accused of smoking marijuana, was afforded an opportunity to rebut accusations against him and no action was taken as a result.

Given the lack of credibility of Bade's version, the employer's reliance on Bade's version in terminating the Complainant, and the employer's failure to afford Sanders a similar level of process to which a white employee was afforded, I find that race was a substantial motivating factor in the Complainant's discharge.

While it may have been inappropriate for the Complainant to have engaged in a verbal argument with Bade, the Complainant has shown by a preponderance of the evidence - albeit circumstantial evidence - that the Complainant's race (an illegal factor) also motivated his discharge.

Signed and dated this 22nd day of May, 1985.

EQUAL OPPORTUNITIES COMMISSION

Allen T. Lawent
Hearing Examiner

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[1] U.S. Postal Service Board of Governors v. Aikens, 103 S. Ct. 1478, 31 EPD par. 33,477 (1983). Aikens makes clear that once all the evidence has been let into the record (i.e., the case has proceeded to completion without being dismissed via an interim motion), the analysis should focus on the Complainant's ultimate burden of proof, not the interim burden.

[2] State v. WERC, 122 Wis. 2d 132 (1985); Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., 35 Wis. 2d 540, 151 N.W. 2d 617 (1967). These cases have applied the "in-part" test to state and municipal labor relations acts (SELRA and MERA). In Wisconsin Dept. of Agriculture v. LIRC, 17 EPD par. 8607 (1978), the Hon. George R. Currie, applied the Muskego-Norway test to an employment discrimination case under the (WFEA) Wisconsin Fair Employment Act, sec. 111.31, et seq. This Examiner finds the "in part" test also applies to cases under Sec. 3.23, Madison General Ordinances.

[3] In WERC and Muskego-Norway (see Footnote 2, above), the Court rejected application of the so-called Wright Line approach in labor cases which would permit an employer to avoid a finding of violation by demonstrating as an affirmative defense that the employer would have taken the employment action (discharge or other action) even if the employee had not engaged in the protected union activity.

The Wright Line test is analogous to the "but for" standard that has been used in the employment discrimination area. The "but for" test requires the Complainant to prove that the adverse employment action (discharge or other action) would not have occurred "but for" the alleged discrimination. Effectively, the "but for" test allows the employer to allege a Wright Line - type defense that it would have taken the adverse action even absent the alleged discrimination.

The "in part" test as applied to employment discrimination differs from the "but for" test in that the Complainant would be entitled to a finding of discrimination under the "in part" test by showing that his/her protected status (race, sex, handicap, age, and so on) was a motivating factor in the employer's action (discharge or other action), no matter how many other (legitimate) factors were present. The employer's defense that it would have taken its action anyway would then go only to the issue of appropriate remedy (but would not defeat the liability finding). Although Wisconsin courts have often looked to federal (42 U.S.C. sec. 2000e, et seq.) Title VII precedent in deciding WFEA employment discrimination cases, the state courts are not bound by federal precedent when deciding cases under the WFEA. In that the Wisconsin Supreme Court has established the "in part" test as the standard in labor cases and has rejected Wright Line, this Examiner finds the "in part" test and not the "but for" test to be the appropriate test in employment discrimination cases under the local ordinance.

[4] Same as Footnote 2.

[5] See discussion in Footnote 3.

[6] Same as Footnote 2.

[7] Among Sanders' claims was that the employer did not have a pair of brown pants that fit him which he could buy. There is no dispute that Sanders was obligated, as were all similarly situated employees of the Respondent, to buy his own pair of pants.

The fact that the employer did not have a pair of pants that fit Sanders was not shown to have anything to do with Sanders' race. And Sanders had been slow in finding a pair of brown pants from another source. The Complainant, by his attorney, argued that the employer made pants available to its employees at $9 a pair and requested the Examiner take administrative notice that ". . . a man of Mr. Sanders, his height, is not going to find a pair of black pants for -- very little money."

So the record is clear, I do not take such administrative notice of the cost of a pair of pants (black or brown) for a man of Mr. Sanders' height, and I find the Complainant's request to have me take such administrative notice was ludicrous. In short, Sanders did not establish race as a reason that the Respondent did not have available

for Sanders' purchase a pair of uniform pants which fit. But whatever problems Sanders had with his uniform, pants or otherwise, it was the occurrences of April 19, 1984 (and not the uniform problems) that led to his discharge.