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

George E. Guyton 1327 Williamson Street Madison, WI 53703 Complainant vs. John Rolfsmeyer d/b/a Appliances Unlimited 940 Williamson Street Madison, WI 53703 Respondent	RECOMMENDED DECISION Case No. 20424

A complaint was filed with the Madison Equal Opportunities Commission (MEOC) on April 3, 1985 alleging discrimination on the basis of race in regard to employment. A supplemental complaint was filed on May 7, 1985 alleging, in addition to what was contained in the April 3 complaint, further allegations of discrimination on the basis of race and/or color.

Said complaint, as supplemented, was investigated by Mary Pierce, an MEOC investigator. An Initial Determination dated June 17, 1985 was issued concluding that, "There is probable cause to believe that the Respondent discriminated against the Complainant because of his race in violation of Sec. 3.23, Madison General Ordinances, the Equal Opportunities Ordinance."

Conciliation failed or was waived. The case was certified to hearing and a hearing was held commencing on January 17, 1986. Atty. Jeff Scott Olson of **Julian and Olson, S.C.** appeared on behalf of the Complainant who also appeared in person. Atty. James W. Gardner of **Lawton and Cates** appeared on behalf of the Respondent who also appeared in person. Based on the record, the Examiner enters the following Recommended Decision:

RECOMMENDED FINDINGS OF FACT

1. The Complainant, George Guyton is an adult, black male.
2. The Respondent, John Rolfsmeyer, is the owner of Appliances Unlimited.
3. Rolfsmeyer employed the Complainant to work at the 940 Williamson Street location of Appliances Unlimited which is located in the City of Madison.
4. Guyton began his employment on or about November 8, 1984 as a part-time worker performing general labor tasks including cleaning, sanding and painting used refrigerators and stoves.
5. Shortly after he started working for Rolfsmeyer, the Complainant attended a Bible study organized by Rolfsmeyer and held at the Williamson Street location on a Wednesday morning prior to work. Rolfsmeyer had encouraged Guyton to participate, but Guyton's attendance was voluntary.
6. After the first Bible study meeting which Guyton attended, he and a white co-employee, Greg Huntington, were working together on preparing a refrigerator. A customer who recognized

Huntington came by and asked Huntington what he was doing. Huntington responded, in a voice loud enough for Guyton to hear, that he (Huntington) was "just doing some nigger work."

7. When asked about his remark by Guyton, Huntington said that he was sorry, but he just did not like blacks and he never had. Huntington also said that he did not appreciate attending Bible study with a black man.
8. A day or so later, Guyton was working on a stove but had not completed painting it. Huntington moved the stove and dolly which Guyton was using to a location out of the store. When Guyton asked Huntington about the whereabouts of the stove and dolly, Huntington said, "If you want it nigger, it's outside." Huntington also told Guyton that he (Huntington) didn't like "niggers".
9. After the stove and dolly incident, Guyton complained to his supervisor, Julia Burns, that he was upset about Huntington's interference with his work. Guyton did not mention anything about a racial problem. Burns instructed Guyton and Huntington to stay away from each other and also instructed Huntington to stay away from Guyton's work.
10. Guyton was absent from work for a few days after the stove and dolly incident. Rolfsmeyer came to Guyton's house to ask Guyton to return to work. At this time, Guyton informed Rolfsmeyer of the problems he (Guyton) was having with Huntington, including the racial remarks made after the Bible study and related to the stove and dolly incident. Rolfsmeyer told Guyton he (Rolfsmeyer) would "religious counsel" Huntington. This conversation was the first time Guyton had complained to Rolfsmeyer about Huntington's racial remarks.
11. Rolfsmeyer spoke with Huntington about Guyton's complaints. Huntington denied them. After this time, Huntington and Guyton worked apart approximately 90% of their work time, with Huntington generally working on a different floor than Guyton or with Huntington working out of the building.
12. Guyton returned to work and shortly thereafter broke his finger at work. At Rolfsmeyer's request, Guyton worked despite the broken finger in order to help with the delivery and installation of 77 refrigerators. Some of the refrigerators were left over, and the next day Guyton was instructed by Rolfsmeyer to take the refrigerators to the Appliances Unlimited warehouse at a different location than Williamson Street.
13. Guyton drove and Huntington rode along to the warehouse. Guyton had never been to the warehouse while Huntington had been there the previous day. Huntington misdirected Guyton and Guyton drove around at least forty-five minutes without finding the warehouse.
14. Guyton then drove over to where Julia Burns was working at another Appliances Unlimited location near a Farm and Fleet store on Highway 51. Burns sent Guyton and Huntington back to the Williamson Street store. On the way back to Williamson Street, Huntington called Guyton a "nigger" and beat on the dashboard. Huntington said he just didn't like "niggers" and he didn't understand why Rolfsmeyer didn't let him (Huntington) drive in the first place. Guyton became scared and was ready to jump out of the truck, although he did not.
15. The following day, Guyton informed Burns of Huntington's behavior on the way back to Williamson Street. Burns suggested that Guyton speak with Rolfsmeyer, which Guyton did. Guyton told Rolfsmeyer of all the previous day's events pertaining to the warehouse trip, including Huntington's racial remarks. Rolfsmeyer then spoke with Huntington about Guyton's complaints, which Huntington denied.
16. On one occasion, co-worker Dean Smyth heard Huntington call Guyton a "damn nigger" during an argument. Smyth reported the racial remark to a supervisor named Dan (Dibbert). It is not clear on what date during Guyton's employment that this incident occurred.
17. On February 28, 1985, Huntington was warned by Rolfsmeyer that he (Huntington) would be terminated for making racial slurs, for directly criticizing Guyton about his work or for moving things Guyton was working on.

18. Guyton, on advance notice, was permitted by Rolfsmeyer to be absent to attend certain court proceedings and for some other reasons. He was, in addition, supposed to call in if he was going to be absent for any reason and had not given or been able to give advance notice. However, Guyton missed nine scheduled days of work between January 3, 1985 and March 4, 1985 for which he had not notified the employer in advance and had not called in. In one instance, he bought a used car when he was supposed to be working. He was verbally warned at least five times about his absenteeism (and tardiness), and was aware that one of the verbal warnings was also written. Guyton was told on two separate occasions by Rolfsmeyer that he would be terminated if his absenteeism continued.
19. Rolfsmeyer generally recorded his version of verbal warnings that he gave to employees on Employee Warning Record forms for his own reference in the event of later litigation. Rolfsmeyer rarely showed the warned employees copies of warnings and rarely asked employees to sign warnings.
20. Guyton was an excellent worker, except for his absenteeism.
21. Guyton, Huntington, Bruce Hotchkin, Burns and the TV repair person (Irv) were in the shop area of the Williamson Street store on or about the morning of March 7, 1985. Burns asked Hotchkin, the delivery manager, about three washing machines in the store driveway that were damaged and appeared to have been backed into by a vehicle. At that time, Huntington said Guyton was responsible for the damage and that he (Huntington) had seen Guyton damage the washing machines. Burns approached Guyton and said Huntington had accused him (Guyton) of backing into the washing machines and damaging them. Guyton denied responsibility for the damage.
22. Shortly thereafter, Guyton and Huntington began arguing verbally. As the argument progressed and became more heated, Huntington called Guyton a "boy." Both Burns and Hotchkin asked Guyton and Huntington to cool down. Burns and Hotchkin stepped out of the shop, which had a window in the door, to discuss the problem that had developed between Huntington and Guyton.
23. As Burns and Hotchkin were talking, Guyton came across the room about twenty feet to where Huntington was working inside a refrigerator. Guyton and Huntington grabbed each other's shirt at about the same time from opposite sides of the refrigerator door. A struggle ensued, and the refrigerator was knocked into a freezer, damaging both appliances. Guyton reached back and picked up a pipe wrench off the work bench as he held onto Huntington. Hotchkin then came back through the door of the shop and to where Guyton and Huntington were struggling. Hotchkin grabbed on to both Guyton's and Huntington's arms and attempted to get the pipe wrench away from Guyton. Hotchkin called to Burns (who was also back in the shop) and Irv for assistance. Guyton threatened to kill Huntington (or take his head off). The altercation was ultimately broken up.
24. After the fight had ended, Guyton repeated his threat to kill Huntington and said Huntington should not show his face on Williamson Street because Guyton was going to get some of his buddies and come down and beat him up.
25. Huntington and Guyton were each told he was terminated by Rolfsmeyer in the afternoon of the same day as the fight. But for the fight, Guyton would not have been terminated on that day.
26. While Rolfsmeyer was on vacation, Guyton represented to Burns and Rolfsmeyer's mother that he had been authorized by Rolfsmeyer to work. Guyton was permitted to work part of a day, but has not been paid because he has failed to turn in a timecard as he has been asked to do.
27. Rolfsmeyer had not given Guyton permission to work, and Rolfsmeyer so informed Burns when he (Rolfsmeyer) returned from vacation.
28. While Guyton was employed at Appliances Unlimited, Rolfsmeyer came to the Complainant's home on various occasions to minister to Guyton's sick child, talk with Guyton about problems

one of his children was having in school, to visit Guyton when he was sick and for other personal visits. Rolfsmeyer also testified on Guyton's behalf at a child custody proceeding.

29. After Guyton's termination, Rolfsmeyer invited and paid for Guyton and his wife to go to a function of the Christian business group to which Rolfsmeyer belonged. Rolfsmeyer also drove the Guytons to and from the event.
30. A black employee named Leroy Carter was employed by Rolfsmeyer at Appliances Unlimited for one day. Carter told Hotchkin that Huntington had taken a dolly from him (Carter) and that Huntington subsequently told Carter that, if he wanted the "damn thing" he (Carter) could go outside and get it himself. Later, Carter threatened Huntington with a pipe wrench and claimed he (Carter) had been racially harassed by Huntington.
31. Huntington was Guyton's co-employee and Huntington had no supervisory authority.
32. Based on the information that Rolfsmeyer knew or should have known about Huntington's behavior toward the Complainant, the Respondent did not discriminate against the Complainant on the basis of race in regard to terms or conditions of employment; specifically, in regard to racial harassment.
33. The Respondent did not discriminate against the Complainant on the basis of his race in regard to discharge from employment.

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 did not discriminate against the Complainant on the basis of race in regard to terms or conditions of employment in violation of Sec. 3.23, Madison General Ordinances; specifically, in regard to racial harassment.
4. The Respondent did not discriminate against the Complainant on the basis of race in regard to discharge in violation of Sec. 3.23, Madison General Ordinances.

RECOMMENDED ORDER

That this case be and hereby is dismissed.

MEMORANDUM OPINION

This case presents a situation where an employee and an employer who had, and still seem to have, a good interpersonal relationship are on opposite sides of an administrative lawsuit.

Guyton, who is black, obtained a job from Rolfsmeyer who runs a business called Appliances Unlimited. Guyton began work on or about November 8, 1984. Guyton performed general labor tasks and was considered an excellent worker when he worked, but had an absenteeism problem despite being extended great latitude and leniency by Rolfsmeyer.

Although Guyton had been verbally warned twice that further absenteeism would result in termination, he was not ultimately terminated until after an alteration that involved a white co-employee, Greg Huntington.

It is essentially Guyton's claim that he was racially harassed by Huntington throughout his employment, that Rolfsmeyer was aware or should have been aware of the racial harassment and that

Rolfsmeyer's failure to have previously terminated Huntington for harassment led to the fight which resulted in Guyton's termination (as well as Huntington's).

Even isolated instances of racial remarks or racially motivated harassment can have a detrimental impact on an employee who feels s/he was directly or indirectly the brunt of verbal or other racial harassment. In this case, the Complainant has testified that he was the object of more than isolated or accidental harassment by Huntington. However, the Complainant has failed to show that his employer was liable for the harassment, based on what the employer knew or should have known and the steps the employer took to prevent the harassment.

LEGAL ISSUES

The essential issues in this case are (a) did racial harassment occur; (b) if so, what did the employer know or what should the employer have known about the racial harassment;[1] and (c) did the employer fail to take reasonable steps to redress or eliminate the racial harassment?[2]

Before addressing the legal issues, I will briefly address the credibility of Guyton and Rolfsmeyer. Each had some flaws in his respective testimony. The flaws in Rolfsmeyer's testimony include his warning Guyton for a day of absence, January 2 of 1985, on which Guyton was excused as evidenced by the fact that Rolfsmeyer had that day testified on Guyton's behalf at a child custody proceeding. Also, Rolfsmeyer testified at the child custody proceeding that Guyton had applied for a job without mentioning anything about Guyton having borrowed or having attempted to borrow money. At the present hearing, Rolfsmeyer testified that Guyton first borrowed money from him and that when Guyton returned a second time to borrow money, Rolfsmeyer told him (Guyton) that he (Rolfsmeyer) could not loan any more money to him (Guyton) but that he could offer him (Guyton) a job.

Guyton's credibility problems are by far the more severe, however.

One notable problem with Guyton's testimony includes his description about the altercation with Huntington. Guyton claims Huntington smashed a refrigerator door into his chest to start the fight and that he (Guyton) gave up the pipe wrench willingly to end the fight. The more credible testimony of Hotchkin and Burns, however, is that Guyton initiated the physical confrontation with Huntington and that Guyton did not yield the pipe wrench willingly.

Further, Guyton denies that he afterwards threatened to bring around couple of friends to beat up Huntington if Huntington showed his face on Williamson Street. The more credible testimony of Hotchkin and Burns was that he (Guyton) did make the threat.

Still another problem with Guyton's testimony was his statement that Rolfsmeyer had called him (Guyton) a "nigger" during a telephone conversation. When questioned about the telephone conversation at an earlier deposition, Guyton did not make any mention that Rolfsmeyer had called him a "nigger." Since the alleged racial remark by Rolfsmeyer would have been the only other one that was made to Guyton by someone other than Huntington, it is unlikely that Guyton would have omitted the remark during the earlier deposition. I, therefore, find it likely that Rolfsmeyer never made the remark at all. Also, Guyton testified that he was absent January 8 to 11, 1985 on account of a hemorrhoid problem and that he had seen Dr. Morton in that regard. Yet, Guyton later admitted that he was only guessing when confronted with evidence that he had not seen Dr. Morton until February, 1985 about the hemorrhoids.

Without belaboring the point with other examples, I find that Guyton has some severe credibility problems. Nevertheless, I do believe that he was the victim of some racial harassment by Huntington. An employee's testimony, to the extent that it is credible, may support a finding of racial harassment where the employer has presented no evidence to refute or deny it.[3]

Had Huntington been a supervisory employee, the employer would have been liable for his conduct.[4] However, Huntington was not a supervisor. Consequently, the employer's liability for Huntington's conduct depends on what the employer knew or should have known and whether the employer, based on what the employer knew or should have known, failed to take reasonable steps to redress or eliminate the racial harassment.

A. Did racial harassment occur?

I have given Guyton the benefit of the doubt, despite his credibility problems, and have entered findings that Huntington racially harassed him on number of occasions prior to the fight that led to their discharge: the post Bible-study incident, the stove and dolly incident, the truck incident, the incident witnessed by Smyth where Huntington called Guyton a "damn nigger".

B. What the employer knew or should have known.

Prior to the fight, Rolfsmeyer personally knew that Guyton had complained on two occasions about three separate incidents of racial harassment and that Huntington had denied them.[5] There were apparently no co-employees or supervisors who witnessed the three incidents, nor did the Complainant produce any other witnesses to those incidents.

Rolfsmeyer is also imputed to know anything that his supervisors knew or should have known. Thus, Rolfsmeyer should have been aware that Smyth had reported an incident to Dan (Dibbert) that he had heard Huntington call Guyton a "damn nigger." Because Hotchkin knew about it, Rolfsmeyer also should have known of the friction that occurred between Huntington and Leroy Carter, (a black employee who worked for only a single day at Appliances Unlimited), although there is not sufficient evidence to show that Huntington's actions toward Carter were in fact racially motivated.

Other than the one remark witnessed by Smyth, there is no evidence that any other employee witnessed the racially motivated incidents that occurred between Huntington and Guyton. Consequently, Rolfsmeyer primarily had two conflicting stories from two employees.

Rolfsmeyer counseled Huntington on two occasions. While acknowledging that Huntington denied Guyton's allegations, Rolfsmeyer specifically told him (Huntington) that racial harassment would not be tolerated at Appliances Unlimited. In addition, after Guyton's first complaint to Rolfsmeyer, Huntington's and Guyton's job assignments were separated so that they worked apart approximately 90% of the time with Huntington generally working on a different floor or being out of the building. And on February 28, 1985, Rolfsmeyer warned Huntington that he would be terminated if he made any racial slurs or otherwise harassed Guyton.

C. Did the employer fail to take reasonable steps to redress or eliminate the racial harassment?

Based on the information Rolfsmeyer knew or should have known prior to the fight, Rolfsmeyer's actions of separating the employees as much as possible and threatening Huntington with termination were reasonable steps and probably the most severe actions that he could have taken under the circumstances. The employer did not ignore Guyton's complaints; rather, the employer was limited in

the action he could take because of the weaknesses of both Guyton's evidence and Guyton's own credibility.

While this Examiner believes some of the Complainant's testimony that racial harassment occurred, the evidence is admittedly skimpy. Guyton has some severe credibility problems with his testimony (discussed previously), and has a witness (Smyth) to a single instance of racially derogatory name calling prior to the fight. The Complainant also raise an innuendo that Huntington may have committed racially motivated harassment against another black employee, Carter, but the Complainant falls far short of showing that Huntington did racially harass Carter. Even if the employer had investigated Guyton's complaints more closely, there is no evidence that the employer would have discovered anything else pertaining to the alleged harassment that he should have known.

In a case where the evidence is slim, such as this one, there is little more that the employer could have done than separate the employees as much possible and make clear to the alleged offender (Huntington) that racial harassment was against the employer's policy and would result in termination. If Guyton had stronger supporting evidence of the racial harassment that the employer knew or should have known, the employer would have been expected to have taken stronger measures against the offender (Huntington).

DISCHARGE

As for the discharge itself, there is evidence that Huntington called Guyton a "boy" during the heat of argument. But the evidence is also clear that Guyton initiated the physical confrontation that ensued as a result of the verbal argument. While Guyton's frustration and anger at Huntington for accusing him (Guyton) of running over some damaged appliances (for which it was never proved who was responsible) is understandable, the law simply will not tolerate violent means of resolving a dispute even where an individual believes s/he is being racially harassed. In fact, a primary purpose of the anti-discrimination laws is to avoid violent resolution of these disputes.

This is not a case of self-defense. This is a case of verbal argument that escalated into a physical confrontation when the Complainant walked twenty feet across a room to where Huntington was. An altercation ensued, ending only after Guyton picked up a pipe wrench and threatened to kill Huntington (or take his head off) and the pipe wrench had to be forcibly removed from Guyton's unwilling hand. Guyton afterwards also threatened to bring a group of friends to Williamson Street to beat up Huntington.

While, as I have acknowledged, even a single incident of racial harassment may create detrimental and long-lasting frustration for the victim, under no circumstances does the law condone violent confrontation as a method of resolving the dispute. Guyton's recourse would have been to complain about Huntington's having accused him of damaging the appliances and having called him a "boy," and to have asked the employer to impose further discipline on Huntington. If dissatisfied with the employer's response, Guyton could have pursued the matter through legal channels. Guyton instead took the law into his own hands by initiating a physical altercation and did not give the employer a chance to act further.

While I can sympathize with Guyton's frustration, the law will not excuse his conduct in regard to the fight.

SUMMARY

In summary, I point out that had Huntington had any supervisory authority over Guyton, the employer would have been liable for Huntington's conduct regardless of whether the employer (Rolfsmeyer) personally knew; Huntington's acts would have been imputed to Rolfsmeyer on an agency theory. Thus, I would have found the employer liable for racial harassment, but not for the discharge because Guyton initiated the physical conflict. However, Huntington was neither Guyton's supervisor nor anyone else's supervisor at Appliances Unlimited.

In the circumstances where co-employee harassment is involved, the proof requirements are more burdensome on the Complainant. The Complainant must not only establish that the harassment occurred, but also that the employer knew or should have known about it. In addition, depending on what the employer knew or should have known, the Complainant must ultimately show that the employer failed to take reasonable steps to prevent the racial harassment from occurring.

In this case, the evidence is that the co-employee offender (Huntington) almost always racially harassed the Complainant when no supervisors or other witnesses were present and the employer was unable to distinguish between the truth of Guyton's complaints and Huntington's denials. Nevertheless, the employer took action to separate the two employees as much as possible, counseled the offender (Huntington) on the anti-harassment policy in the workplace and threatened to terminate him for racial slurs or other harassment of Guyton. The Complainant failed to show that the employer's actions, under the circumstances, were not reasonable and the Complainant specifically failed to show that his discharge was a result of the employer's failure to adequately discipline Huntington for the harassment (based on what the employer knew or should have known).

While the law on harassment could be more effective if it were otherwise, the present status of the law is that employers are not as readily accountable for racial harassment by co-employees as for supervisory employees. And the Complainant has not carried his burden to establish liability on the part of the employer (Rolfsmeyer) in this case. Huntington could have been personally liable, but he was not named as a party in this case.

Signed and dated this 28th day of April, 1986.

EQUAL OPPORTUNITIES COMMISSION

Allen T. Lawent
EOC Hearing Examiner

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[1]EEOC v. Murphy Motor Freight Lines, Inc., 488 F. Supp. 381, 22 FEP 892 (1980).

[2]Ibid.

[3]Erebia v. Chrysler Plastic Products Corp., 772 F. 2d 1250, 37 EPD par. 35, 317 (CA-6, 1985), cert. den. (U.S. S. Ct. 1986), 39 EPD par. 35, 875.

[4]Vinson v. Taylor, 753 F. 2d 141, 36 EPD 34, 949 (CA, D of C, 1985), cert. granted by U.S. Sup. Ct. (10/7/85).

[5]See Recommended Findings of Fact 10 and 15.