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

Gloria Stinson Post Office Box 8281 Madison, WI 53708 Complainant vs. Bell Laboratory 3699 Kinsman Boulevard Madison, WI 53704 Respondent	RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER AND MEMORANDUM DECISION Case No. 20762

On March 13, 1987, Gloria Stinson (Complainant) filed a complaint of discrimination with the Madison Equal Opportunities Commission, alleging that she had been racially and sexually harassed in her employment. On May 19, 1987, Stinson amended her complaint and charged that the Respondent, Bell Laboratories, discharged her from her employment because of her race and her sex and in retaliation for having filed a complaint of discrimination against Respondent. Following an investigation of the complaint, an MEOC Investigator issued an Initial Determination finding probable cause to believe the discrimination alleged by Complainant had occurred. Conciliation was waived and the case was certified to public hearing on August 7, 1987. A hearing was held before MEOC Hearing Examiner Harold Menendez on June 28 and 29, 1988. The Complainant appeared in person and by her attorney, Anne T. Sulton. Respondent appeared by its counsel, Paul A. Hahn, Boardman, Suhr, Curry & Field, and by Patrick Shallow, Plant Operations Manager.

On the basis of all the evidence in the hearing record, the hearing examiner now enters the following:

RECOMMENDED FINDINGS OF FACT

1. The Complainant, Gloria Stinson, is a black female.
2. The Respondent, Bell Laboratories, produces and packages pesticides in a production facility located in the City of Madison.
3. Respondent hired Complainant to work as a packer on June 23, 1986. Complainant worked on the second shift, which operated from 4:30 p.m. until 1:00 a.m. Of approximately fifteen second shift production workers employed by Respondent during the period Complainant was employed, six or seven were female. Complainant was the only black second shift employee.
4. During the time Complainant was employed by Respondent, second shift supervisory duties alternated between Jeffrey Ballweg and Daniel Frosch. In the late winter or early spring of 1987, Larry Millard was second shift supervisor for one month.
5. Respondent also designated certain second shift production workers as lead persons. Lead persons have certain recordkeeping responsibilities, assist in training production workers, and perform regular production work. Lead persons also relieve production workers when they take their meal breaks or leave their work stations for other reasons. Lead persons do not have the authority to hire, fire or discipline employees. Lead persons are not supervisors or managers.

6. During the first few months of her employment, Complainant was regarded as a very good worker and got along well with her co-workers. Her 30-day, 60-day and 90-day reviews were all positive.
7. Toward the end of 1986, Complainant's co-workers, lead persons and supervisors all noted a deterioration in her work performance. Christine Cooper, Jeffrey Ballweg, Daniel Frosch and Larry Millard all observed Complainant leaving her work station without permission on numerous occasions. Frosch, Ballweg, Cooper, Rick Otis and Tim Zettler all observed on various occasions that Complainant was not keeping up with the work on the production and packaging lines. Complainant was also observed to mumble and yell or shout off into space while working. On one occasion in December of 1986, Patrick Shallow, who was then Respondent's Production Personnel Manager, noticed that Complainant stood around doing no work for approximately twenty minutes.
8. In late December of 1986 Daniel Frosch conducted Complainant's six month review. His report indicated that Complainant was often late and that she was having problems getting along with co-workers. Frosch also noted that, although Complainant had demonstrated the ability to do good quality work in acceptable quantities, her production level was low. His report included the following comment: "I think someone should talk to her. If no improvement, let her go. Might be best for second shift."
9. On January 26, 1987, Patrick Shallow met with Complainant to discuss her six month review. Shallow told Complainant that she would receive an hourly wage increase based on her good performance during the early months of her employment, but expressed concern over her recent performance and advised Complainant that her performance had to improve.

    During this meeting, Complainant told Shallow she had been subjected to racial slurs and that some of her co-workers had attempted sexual contact with her and had asked her to have sex with them. When Shallow requested more information so that he might investigate her charges, Complainant refused to give him any such information or to identify anyone who had harassed her. Shallow informed Complainant he would speak with the supervisors and would ask them to be alert for and report any harassment. He also asked her to contact him immediately if she was subjected to harassment.

    Prior to this meeting, Complainant had not complained to any lead worker, supervisor or manager about harassment of any sort. On one occasion, Jeffrey Ballweg observed that Complainant and a male co-worker were arguing and was told by Complainant that the male co-worker had called her "slut." Ballweg admonished both the Complainant and her male co-worker for their behavior.

10. Following his January 26, 1987 meeting with Complainant, Shallow spoke with supervisors and learned that they were not aware of any harassment of the Complainant. Shallow reminded the supervisors that harassment is prohibited and asked them to be sensitive to and report any possible harassment of Complainant to him.
11. Complainant was not subjected to any sexual comments, attempted sexual contact, for any behavior of a sexual nature after January 26, 1987.
12. Complainant's supervisors and co-workers continued to observe problems in her work performance and behavior. Daniel Frosch and Jeffrey Ballweg spoke with her about leaving her work station. Ballweg and Christine Cooper tried on a number of occasions to assist Complainant by demonstrating how she could better perform her work and by suggesting different approaches to the work.

13. On March 2, 1987, Daniel Frosch asked Complainant to move her car during her meal break. Instead of waiting for her meal break, Complainant immediately left her work station without permission, and moved her car. Frosch then issued Complainant an oral warning. He had previously warned Complainant that she could not leave her work station without permission.
14. On March 9, 1987, Jeffrey Ballweg learned that Complainant had left her work station without permission. He went to the break room, where he found Complainant, and observed that she remained away from her station for about ten minutes. Ballweg issued Complainant a written warning. Complainant later explained to Shallow that she wanted to get the last remaining bag of Cheetos in the vending machine.
15. Shallow met with Complainant again on March 11, 1987 to discuss the March 9 incident and an argument she had had with a co-worker. At that time, Complainant told Shallow that people were still picking on her and that nothing had changed since she had last spoken with him. Once again, she declined to describe the harassing conduct or identify those she claimed were harassing her.
16. Between her January 26 and March 11 meetings with Shallow, Complainant made no complaints of harassment to any lead workers, supervisors or managers.
17. On March 13, 1987, Complainant filed a complaint of discrimination against Respondent, alleging racial and sexual discrimination. Specifically, Complainant alleged sexual and racial harassment by co-workers.
18. On March 16, 1987, after learning that a discrimination complaint had been filed, Shallow again spoke with Complainant and asked her to provide specific information regarding the harassment she alleged. Complainant then made a number of specific accusations of harassment and named several individuals.
19. Shallow immediately commenced an investigation of Complainant's charges. He interviewed each individual whom Complainant alleged either participated in or had knowledge of the harassment and took a written statement from each. He was unable to confirm any of Complainant's charges.
20. On March 23, 1987, Shallow met with Complainant to apprise her of the results of his investigation. When he asked her if there was anything else he could do to help, Complainant replied that there was not.
21. On May 13, 1987, Shallow discharged Complainant. The discharge was not prompted by any particular incident, but by Complainant's continued poor work performance and behavior.
22. Complainant's sex did not play any role in Respondent's decision to discharge her.
23. Complainant's race did not play any role in Respondent's decision to discharge her.
24. The fact that Complainant made complaints to Respondent and filed a complaint of discrimination with the Equal Opportunities Commission played no role in Respondent's decision to discharge her.

RECOMMENDED CONCLUSIONS OF LAW

25. The Complainant is protected by the Equal Opportunities Ordinance from discrimination in employment on the basis of her sex or race or because she filed a complaint of discrimination with the Madison Equal Opportunities Commission.
26. The Respondent is a person within the meaning of Sec. 3.23 (2) (a), Mad. Gen. Ord., and is an employer subject to the provisions of Sec. 3.23 (7), Mad. Gen. Ord., which prohibits discrimination in employment on the basis of sex or race.
27. The Respondent is an employer within the meaning of Sec. 3.23 (8), Mad. Gen. Ord., which prohibits discrimination against any individual because that individual has made a complaint to or otherwise participated in proceedings before the Madison Equal Opportunities Commission.

28. The Respondent did not discriminate against Complainant with respect to the terms and conditions of her employment on the basis of her race or sex because she filed a complaint of discrimination with the Commission.
29. The Respondent did not discriminate against Complainant on the basis of her race or sex in terminating her employment.
30. The Respondent did not, in terminating her employment, discriminate against Complainant because she filed a complaint of discrimination with the Commission.

RECOMMENDED ORDER

31. The complaint, as amended, is dismissed.

MEMORANDUM DECISION

I. Harassment Claim

A claim of racial or sexual harassment in employment will succeed if the complainant is able to prove, by a preponderance of the evidence, that harassment has occurred; that the employer knew or should have known of the harassment; and that despite such knowledge, the employer failed to take appropriate corrective measures. Guyton v. Rolfsmeyer, MEOC Case No. 20424 (Ex. Dec., Apr. 28, 1985); aff'd., (MEOC, Jul. 18, 1986); Zabkowicz v. West Bend Company, 589 F. Supp. 780 (E.D. Wis. 1984); EEOC v. Murphy Motor Freight Lines, Inc., 488 F. Supp. 381 (D. Minn. 1980). Sexual harassment, as distinguished from discrimination on the basis of sex in the terms, conditions and privileges of employment, involves unwelcome physical or verbal acts of a sexual nature, directed at an individual because of the individual's sex. See, e.g., Zabkowicz v. West Bend Company, supra. See also, Sec. 111.32 (13), Wis. Stats. Racial discrimination may involve acts which are overtly racial, as in EEOC v. Murphy Motor Freight Lines, Inc., supra, or acts which are not overtly racial in nature but are motivated by racial animus. See, e.g., Rucker v. Higher Educational Aids Board, 669 F.2d 1179,1182 (7th Cir. 1982); EEOC v. Miller Brewing Co., 650 F. Supp. 739 (E.D. Wis. 1986). The federal courts, in ruling on harassment claims arising under Title VII, have generally held that sporadic or isolated instances of harassment do not give rise to employer liability. See, e.g., North v. Association for Retarded Citizens, 844 F.2d 401, 408-409 (7th Cir. 1988); Lopez v. S. B. Thomas, Inc., 831 F.2d 1184, 1189-90 (2d Cir. 1987); Henson v. City of Dundee, 602 F.2d 897, 904 (11th Cir. 1982). The Madison Equal Opportunities Ordinance,[1] however, takes a less tolerant view of harassment. In Vance v. Eastex Packaging Co., MEOC Case No. 20107 (MEOC, Aug. 19, 1985), the Commission affirmed a hearing examiner's decision holding an employer liable for racial harassment on the basis of three instances of name-calling by a supervisor over an eighteen month period. In Guyton, supra., four acts of racial harassment by a co-worker were deemed sufficient to establish employer liability under the ordinance; the employer escaped liability because it responded promptly and appropriately to the harassment. Since this is a case alleging discrimination under the ordinance, adherence to the standards articulated in Guyton and Vance is appropriate, and the Complainant is not required to show harassment as pervasive as that which was present in Zabkowicz or Murphy to prevail in her claim.

Even under the less demanding standards articulated in Vance and Guyton, the evidence is insufficient to prove the three elements of a sexual or racial harassment claim. First, the testimony of the Complainant, Gloria Stinson, was marked by significant inconsistencies

and was generally vague. Her recall was also shown to be poor. As a result, the accuracy and reliability of her testimony are subject to question. In addition, the evidence fails to establish that the Respondent failed to take appropriate corrective action upon learning that Stinson may have been subjected to racial or sexual harassment.

The record reveals a number of troubling inconsistencies and contradictions in Complainant's testimony. In support of her claim of racial harassment, Complainant first testified, on direct examination by her attorney, that the only racial slurs she could recall having heard were "black" and "kinky hair," and that each of these terms was used by only one co-worker. She testified that only Christiana Cooper called her "kinky hair" and that another female co-worker, identified only as Kelly, was the only person to call her "black." Complainant also testified that she could not recall having heard anyone make any other racial slurs.[2] Later, still on direct examination, Stinson testified that "[f]our or five guys" regularly referred to her in negative racial terms, but did not state what those terms were or indicate to whom she was referring in this portion of her testimony.[3] In view of the earlier testimony, Stinson's later assertions are difficult to accept.[4,5]

Stinson's testimony regarding sexual harassment was also marked by inconsistencies. At first she testified that she was sexually harassed on five or six occasions. She then detailed three instances of harassment: one early in her employment when male employees stood outside the ladies' room and tried to look in as Stinson changed her clothes; another instance -- this one in the mill room -- involved unidentified male co-workers rubbing their penises against her buttocks; the third instance involved similar conduct by Larry Millard about a week later. After testifying about these three incidents, Stinson's direct examination continued as follows:

> Q. Were there any other instances where you were harassed, sexually harassed by co-workers?
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> A. Not that I remember.
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> Q. So there were essentially then three instances; one where you were dressing in the ladies' rest room where the door was being opened and the second in the back room where the male co-workers were rubbing against you during the course of the evening, and the third one where Larry Millard rubbed against you on the line?
>
> A. Yes.
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> Q. Were there any other instances that you can recall?
>
> A. No.

Hearing Transcript at 60.

Again, Stinson's later testimony on the subject was strikingly different. She testified that male co-workers had regularly tried to watch her change her clothes in the ladies' room over a period of eight to ten months, and then that this went on over a period of five to seven months. Hearing Transcript at 69.[6] A Complainant's testimony need not be a model of clarity and precision to be persuasive. However, when a witness gives clear and

unequivocal answers to simple and specific questions, only to follow that testimony with generalized testimony which is inconsistent and the inconsistencies are not explained, the trier of fact must question the ability of the witness to accurately recount the facts. Findings of fact simply cannot rest on testimony such as that given by Stinson.

Even if we were to assume that Stinson was subjected to acts of racial or sexual harassment, she has failed to prove that Bell Laboratories did not respond appropriately once it knew or had reason to know of such harassment. Although actual knowledge of harassment may not be a predicate to employer liability where the harassment is carried out by supervisory or managerial employees, See, Vance v. Eastex Packaging Co., supra.;[7] there is no evidence that any of Respondent's supervisory or managerial employees participated in or witnessed any acts of racial harassment, and Stinson testified that no supervisor or manager participated in or witnessed any acts of sexual harassment.[8] Thus, there is no basis for applying the strict liability rule of Vance to Bell Laboratories in this case. Stinson testified that she did not complain about harassment to anyone other than Patrick Shallow, then Bell's Production Personnel Manager. She also testified that she filed a complaint of discrimination with the Madison Equal Opportunities Commission in October or November of 1986 and complained to Shallow in December. Shallow testified that Stinson did not complain to him until January 26, 1987, when he met with her to discuss her six month review. His testimony is supported by his notes memorializing that meeting,[9] as well as by the MEOC complaint form executed by Stinson.[10] Stinson's MEOC complaint, filed March 13, 1987 alleges that she complained to Shallow about harassment in January. Because he was forthcoming in his testimony, which was essentially uncontroverted, and because his testimony was generally consistent with the exhibits admitted into evidence, I have accepted Shallow's testimony regarding his meetings and discussions with Stinson as well as his testimony as to his actions in response to Stinson's complaints.

The evidence summarized above establishes that neither Shallow nor any other supervisor or manager had actual knowledge or reason to know of any harassment prior to Stinson's January 26, 1987 meeting with Shallow. The evidence also fails to establish that Respondent did not take appropriate corrective action to remedy or eliminate harassment. If anything, it reveals that Stinson initially refused to make more than generalized claims of harassment and that this limited Shallow's ability to investigate her complaint and specifically address any alleged harassment. Stinson refused to provide Shallow with any specific information when she met with him on January 26, 1987, and did not complain again until March 11, 1987, when Shallow met with her to discuss two recent warnings and a recent altercation with a co-worker. At this time, she told Shallow that people were still picking on her but again refused to identify her harassers or to explain her charges. It was not until March 16, when Shallow met with Stinson after Respondent had already been served with the MEOC complaint that she agreed to identify any of her alleged harassers or provide specific information in support of her charge.

In the face of Stinson's refusal to make specific allegations of harassment in January, Shallow spoke with his supervisors but was unable to determine whether any harassment had occurred. He reminded them of Respondent's policy prohibiting harassment and asked them to be sensitive to and immediately report any possible harassment. He also asked Complainant to report any harassment to him immediately. Complainant testified

that she did not experience any sexual harassment after she complained to Shallow, and offered only a general assertion that she was continuously harassed to prove that racial harassment occurred after January 26, 1987. It is uncontroverted that once Stinson made specific allegations of harassment Shallow immediately undertook a thorough investigation of her charges but was unable to confirm them. It is also uncontroverted that in the course of his investigation Shallow made it clear that Respondent would not tolerate any harassment of its employees. This evidence falls far short of proving that Bell Laboratories failed to respond in an appropriate manner to Stinson's complaints of harassment.[11]

II. Retaliation Claim

The evidence presents a closer case on Stinson's claim that her discharge was in retaliation for having filed a complaint of discrimination with MEOC. Stinson filed her MEOC complaint on March 13, 1987. Patrick Shallow became aware of the complaint by March 16, 1987. He discharged her from her employment less than two months later, on May 13, 1987. The proximity in time of Stinson's discharge to her filing of a discrimination complaint raises an inference that there is a causal connection between the two events. Chen v. General Accounting Office, 821 F.2d 732, 739 (D.C. Cir. 1987); Croushorn v. Board of Trustees, 518 F. Supp. 9, 19 (M.D. Tenn. 1980). Evidence of Respondent's failure to strictly adhere to the progressive discipline procedures laid out in its Employee Manual in discharging Stinson[12] also lends support to her retaliation claim. See, Sorrells v. Veterans Administration, 576 F. Supp. 1254, 1265 (S.D. Ohio 1983). The procedural irregularities in Sorrells were, however, of a more serious nature than those present in this case.[13] Even so, standing alone, the above evidence would support a determination that the Respondent discriminated against Stinson because she had filed a complaint of discrimination with MEOC. There is, however, additional and essentially uncontroverted evidence that Respondent had legitimate non-discriminatory reasons for Stinson's discharge.

Stinson's work performance had been a source of concern to her supervisors and management as early as December of 1986, when Daniel Frosch recommended she be discharged unless her work performance improved and Shallow noticed her standing idly for a lengthy period one day while those around her worked. Other supervisors and a number of co-workers testified that Stinson was unable to keep up on the line and had a tendency to walk away from her work station without permission and without any notice to supervisors or co-workers. In January, Shallow discussed Frosch's six-month review of Stinson with her and warned her that her recent performance had been poor. Stinson has not challenged these assessments, nor has she denied that she was advised of the need to improve. Stinson does not dispute that she was issued two warnings before filing her complaint, or that she committed the infractions for which those warnings were issued. There is no evidence that Respondent was more tolerant of others who committed similar infractions or who performed as poorly as she. Finally, although Stinson testified that criticism of her work and racial harassment intensified after she had filed her MEOC complaint, her testimony on this point was brief and, like most of her testimony, vague and thus insufficient to establish that she was subjected to unfair criticism or racial harassment after filing her complaint.

III. Conclusion

The burden of proof in a harassment case remains with the complainant at all times. Zabkowicz v. West Bend Co., 589 F. Supp. at 784. The same is true with respect to a claim of retaliation. See, Croushorn v. Board of Trustees, 518 F. Supp. at 18-19. The proofs presented here are insufficient to establish that Respondent may be held liable for any racial or sexual harassment Stinson may have experienced and provide no support for her claim that she was discharged because of her race or her sex. In addition, the evidence does not prove that Respondent discharged her in retaliation for having filed a complaint of discrimination with MEOC, or for having complained to Shallow about harassment. The complaint must therefore be dismissed.

Dated at Madison this 17 day of March, 1989.

EQUAL OPPORTUNITIES COMMISSION

Harold Menendez
Hearing Examiner

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[1]Sec. 3.23, Mad. Gen. Ord.

[2]Hearing Transcript, 39-40

[3]Hearing Transcript, 63-64

[4]In addition, Stinson's testimony that Christiana Cooper called her "kinky hair" was directly controverted by Cooper, whose testimony was clear and credible. Cooper's testimony as to why she does not use racial slurs was particularly credible.

[5]The only other evidence offered in support of Complainant's claim of racial harassment was her own testimony that she was locked out of the building one evening and the testimony of Richard Otis, that on a few occasions over a period of two weeks during the summer of 1986, he heard several second shift workers, including Christiana Cooper, use the word "nigger." Aside from Complainant's belief, there is no evidence that she was intentionally locked out of the-building or that this incident was related to her race or sex. In fact, a number of white Bell employees, both male and female, testified they had accidentally locked themselves out. The testimony of Otis is controverted in several respects by that of Cooper and Jeffrey Ballweg. In addition, Complainant herself testified she never heard any co-worker use the word, "nigger."

[6]I also find Stinson's failure to report the bathroom incidents to Respondent at any time to be telling and question whether they actually occurred.

[7]See also, Crear v. LIRC, 114 Wis. 2d 537, 542-43, 339 N.W.2d 350 (Wis. App.), rev. denied, 114 Wis. 2d 603, 340 N.W.2d 202 (1983); But see, North v. Association for Retarded Citizens, 844 F.2d 401, 407 (7th Cir. 1988).

[8]The facts of this case establish that lead persons were not supervisors or managers. See, Crear v. LIRC, 114 Wis. 2d at 541-42.

[9]Exhibit R-4

[10]Exhibit R-10

[11]There is no evidence at all to support Stinson's claim that her discharge was motivated by any racial or sexual animus.

[12]The Respondent's Employee Manual sets out a four-step disciplinary process. The first step is an oral warning, the second a written warning. At the third step, an employee may be demoted, transferred or suspended without pay. The

fourth and final step is discharge. Stinson was disciplined twice for work rule violations, but was not suspended, demoted or transferred before being discharged from her employment.

[13]In Sorrells, the Merit System Protection Board conducted a review and issued an order concluding that the maximum penalty warranted under the circumstances was a thirty-day suspension, which was to serve as a warning to the employee to correct the problem. The Veterans Administration ignored this adjudication and forged ahead with its efforts to remove the employee. 576 F. Supp. at 1265.