

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

<p>Ronald Bordson 1340 Olstad Rd Deerfield, WI 53531</p> <p style="text-align:center">Complainant</p> <p style="text-align:center">vs.</p> <p>Oscar Mayer Foods Corp. 910 Mayer Avenue Madison, WI 53704</p> <p style="text-align:center">Respondent</p>	<p style="text-align:center">RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER. MEMORANDUM DECISION</p> <p style="text-align:center">Case No. 20989</p>
--	--

On July 14, 1988 Ronald Bordson filed a complaint with the Madison Equal Opportunities Commission, alleging that he had been discharged from his employment with Oscar Mayer Foods Corp. because of his arrest record in violation of the Equal Opportunities Ordinance. The complaint was investigated and an Initial Determination was made that probable cause existed to believe discrimination had occurred. Oscar Mayer waived conciliation and the case was certified to hearing.

The hearing in this matter was held before MEOC Hearing Examiner Harold Menendez on May 15 and 16, 1989. The Complainant, Ronald Bordson, appeared in person and was represented by Attorney Jacqueline Macaulay of the firm of Borns, Macaulay & Jacobson. Oscar Mayer appeared by Michael Murphy, its Personnel Director, and was represented by James Holzhauer and Michael Rosenblum of the firm of Mayer, Brown & Platt.

The hearing examiner, having considered all the evidence admitted into the hearing record and the parties' post hearing briefs, now makes the following:

**RECOMMENDED FINDINGS OF FACT**

1. On June 27, 1988 the Complainant, Ronald Bordson, was discharged from his employment with the Respondent, Oscar Mayer Foods Corp. Bordson's employment was terminated by Conrad "Connie" Faust, the Unit 2 Manager, and Michael Murphy; Oscar Mayer's Personnel Director.
2. Bordson was discharged because he had consecutive absences on Saturday, June 25 and Sunday, June 26 which his supervisors regarded as unexcused. It is Oscar Mayer's policy to discharge employees after two consecutive, unexcused absences.
3. Bordson was absent from work on June 25 and 26, as well as June 27, because he had been arrested after leaving work on June 24 and was being held in the Dane County Jail.
4. Bordson had been scheduled to work the second shift on the "lunchables" line on June 25 and 26. The second shift foreman was Jim Hughes. On this particular weekend, the first shift was supervised by Tom Celley, an industrial engineer, who was filling in as temporary supervisor.
5. On weekends the lunchables line was staffed by volunteers. Employees would volunteer earlier in the week to work a particular shift or shifts the following weekend. Once an employee volunteered, however, he was expected to report to work on time and was subject to discipline

for being late or absent from his shift. Because Oscar pays overtime for all weekend work, no extra workers were scheduled for weekend work; only as many workers as were actually necessary to operate a weekend shift were scheduled to work.

6. On Saturday, June 25, Hughes was not sure whether to expect Bordson to report to work or not. He was not contacted by Bordson or by anyone else acting on Bordson's behalf, but had heard from some of Bordson's co-workers that he might not be in. It is also likely that Hughes had heard that Bordson had been arrested the previous day, as the arrest was witnessed by a number of Bordson's co-workers. In any event, Bordson did not report for work that day.
7. On Sunday, June 26 Bordson's wife, Judy Marie Bordson, contacted Tom Celley by telephone during the first shift. She informed Celley that Bordson was in jail and would be absent from work that day and was likely to be absent as well the following day. Celley wrote a note to Hank Malley, who would be Bordson's foreman on Monday, informing him Bordson probably would not be in. Celley did not have the authority to excuse a second shift absence and did not indicate that the June 26th absence would be excused.
8. Hughes, the Second Shift Foreman, did not hear directly from Bordson or his wife on Sunday, June 26, but was certain by the start of the second shift that day that Bordson had been arrested. Again, he didn't know whether to expect Bordson to come to work that day. Bordson did not report to work that day.
9. The treatment of absences is generally left to the foremen or shift supervisors. An employee who will be late or absent is expected to call in and speak with her supervisor. However, sometimes a spouse or relative may call for the employee. In addition, it may be acceptable in some cases to leave a message for the supervisor.
10. An unplanned absence that is called in may be excused or unexcused, depending on Oscar Mayer's particular needs. If there is sufficient staffing to continue operations without difficulty and normal operations will not be disrupted by an absence, it will likely be excused. If, on the other hand, an absence will disrupt normal operations, it may not be excused even if the absence is due to compelling reasons.
11. Because great care is taken to schedule only as many workers as are actually necessary to work on the weekend, an unexpected weekend absence is usually of serious consequence both to Oscar Mayer's weekend operations and to the employee involved. A single absence on the second shift on Saturday or Sunday will, in most cases, disrupt normal operations. On the lunchables line, this means that the production line must be shut down early in order to process or re-process rejects.
12. In general, Hughes will excuse an absence if operations and production are not disrupted. The converse is true if an absence results in a disruption of operations. He does not generally excuse unplanned weekend absences.
13. On both June 25 and 26, it was necessary for the second shift to shut down the production line early because of Bordson's absence.
14. Hughes did not excuse either of these two absences. He knew that, because Bordson's absence on June 25 was unexcused, he would be subject to discharge if his June 26 absence was not excused, that is, if it was treated as either unexcused or AWOL (absent without notice of any kind to Oscar Mayer).
15. Hughes did not consider that the reason for Bordson's absences on June 25 and 26 was that he was incarcerated in deciding these absences would not be excused.
16. On Monday, June 27, 1988 Connie Faust learned that Bordson had been absent from work on June 25 and 26 and that both absences had been unexcused. He discussed the matter with Michael Murphy and stated his intent to discharge Bordson for the unexcused absences. Murphy agreed that Faust should discharge Bordson for having two consecutive, unexcused absences. Faust discharged Bordson that same day.

17. Bordson was officially advised of his discharge in a letter written by Richard Jaeke. The letter, dated June 28, advised Bordson that "you have been discharged from your employment with Oscar Mayer Foods Corporation and you have been separated from the payroll by virtue of the fact that you have been absent from work 'unexcused' since June 25, 1988."
18. Hughes was ignorant of the reasons for Bordson's arrest on June 25 and 26. Faust and Murphy were also unaware of the reasons for Bordson's arrest when they decided to terminate his employment on June 27, 1988.
19. Bordson was not discharged from his employment because of his arrest record.

### **RECOMMENDED CONCLUSIONS OF LAW**

20. The Respondent, Oscar Mayer Foods Corp., is an employer subject to the Equal Opportunities Ordinance.
21. The Complainant, Ronald Bordson, is a member of a class of persons protected by the ordinance from discrimination in employment because of arrest record.
22. The Equal Opportunities Ordinance does not require an employer to excuse, or to refrain from disciplining an employee for, absences occasioned by the employee's incarceration.
23. The Complainant has failed to prove by a preponderance of the evidence that the Respondent discharged him from his employment because of his arrest record.

### **RECOMMENDED ORDER**

24. It is hereby ordered that the complaint herein is dismissed.

### **MEMORANDUM DECISION**

Ronald Bordson was discharged from his employment at Oscar Mayer Foods Corp. after missing work on Saturday and Sunday, June 25 and 26, 1988. He was unable to work either day because he was being held in the Dane County Jail, having been arrested after leaving work on June 24. Bordson claims that he was discharged because he was arrested. Oscar Mayer contends that he was discharged because he had two consecutive, unexcused absences, and it has been its practice to discharge any employee who has two such absences without regard to the reasons for the absences. Bordson argues that Oscar Mayer treated his absences as unexcused because he was in jail, and that in excusing absences for other reasons but not excusing absences due to incarceration, Oscar Mayer discriminated against him because of his arrest record.

The evidence does not support Bordson's contention. I find that Bordson's absences were unexcused not because he had been arrested but because they disrupted the employer's operations. I also conclude that the ordinance does not compel Oscar Mayer to excuse Bordson's absences because they were occasioned by his arrest and incarceration.

Bordson had volunteered to work the second shift on the "lunchables" line on Saturday, June 25 and Sunday, June 26. Having volunteered, he was obligated to work unless he made other arrangements in advance. Every foreman and supervisory employee who testified agreed that the shift foreman determines whether or not an unexpected absence will be excused and that his decision is based on the effect the absence has on operations. For example, if a substitute is available, as is likely to be the case on weekdays, and the employee contacts the foreman in time for the foreman to secure a replacement, the absence is likely to be excused. The same is true if a production line is shut down due to mechanical problems, since it would not be the absence which prevents the line from operating as usual. If, on the other hand, an absence leaves the line or a shift understaffed and no replacements

are available, then the absence is almost certain to be unexcused. Weekend absences are much more likely to be unexcused because only the bare minimum of workers necessary for each shift are scheduled to work on weekends. In the case of Bordson's absences, there is undisputed testimony that the result was that the second shift was left understaffed and that the foreman, Jim Hughes, found it necessary to shut down production early in order to process rejects. Normally, a fully staffed second shift would have had someone working on the rejects, and would not have been shut down early to process or re-process rejects. Accordingly, Hughes considered Bordson's absences unexcused. This is consistent with the practice described by a number of witnesses.<sup>1</sup> Hughes' testimony that Bordson's absences disrupted operations is not directly controverted.<sup>2</sup> Thus, the treatment of Bordson's absences as unexcused was not related to the reason for his absences, but is instead attributable to the fact that they were unanticipated and disruptive of normal operations.

It is also undisputed that Oscar Mayer's policy has been to discharge any employee who has two consecutive, unexcused absences.<sup>3</sup> In this case when Connie Faust, the Unit Manager, learned of Bordson's unexcused weekend absences on Monday, June 27, he reported to Mike Murphy (the Personnel Manager) and recommended that Bordson's employment be terminated pursuant to Oscar Mayer's policy. Murphy concurred and Bordson was discharged.

The burden of proof in this case is with Bordson. He must prove, by a preponderance of the evidence, that he was discharged because of his arrest record. Cf., Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L.Ed. 2d 207 (1981). In this setting he need only prove that Oscar Mayer's explanation for his discharge is untrue to prevail. Cf., U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711, 715, 103 S. Ct. 1478, 75 L.Ed. 2d 403 (1983).<sup>4</sup> He has not.

Bordson relies heavily on the fact that Hughes, Faust and Murphy all knew he was in jail when his absence on Sunday June 26 was deemed unexcused and on Monday, June 27, when the decision was made to discharge him. This by itself does not establish that Bordson was discharged because of his arrest or prove that Oscar Mayer's explanation is unworthy of credence. This is especially true in view of the virtually unchallenged testimony on how absences come to be excused or unexcused and Hughes' testimony that Bordson's absence disrupted operations.

Bordson also attempted to prove that other employees who had two consecutive, unexcused absences were not discharged. He first cites William LaFleur, who had a drinking problem, and argues he "often missed days." Complainant's Brief at 24. The only certain evidence in the record is that LaFleur missed two days of work nine months apart due to his drinking. David Hendricks is another employee whose circumstances Bordson cites to prove Oscar Mayer's explanation for his discharge is untrue. Hendricks' absences were excused because he arranged them a week or more in advance. Paul Thompson also had a drinking problem, but there is no evidence he was absent from work because of his drinking, or that he went on a "binge" when he was scheduled to work. Robert O'Neil was drunk and got arrested. He missed work, but his absence was excused. There is no evidence he had two consecutive absences or that his absence disrupted operations. Patty Amundson was another employee upon whose treatment Bordson relies to prove pretext. Again, there is no evidence that she was absent two consecutive days because of her drinking problem. Other employees who were arrested were not discharged. Robert Burma was arrested and convicted. The evidence is that Burma remained in Oscar Mayer's employ after his arrest. He took vacation for the days he was absent. He was able to work because he had Huber Law work release privileges. He was discharged only after he was sent to prison and was no longer available for work.

Bordson has apparently misapprehended the burden imposed on him in proving that Oscar Mayer's explanation for his discharge is actually a pretext for discrimination. It is not for Oscar Mayer to disprove pretext, but for Bordson to prove that the explanation offered is a pretext for discrimination. Thus the mere utterance of other employees' names without evidence that they were treated differently under circumstances similar to Bordson's, does not shift the burden of proof away from Bordson, nor does it prove that Oscar Mayer's explanation for Bordson's discharge was a pretext for discrimination. The fact that Oscar Mayer's witnesses may not have been certain as to the precise nature of each employee's absences does nothing to advance Bordson's case because there is no evidence that the individuals named were, in fact, absent on two consecutive days,<sup>5</sup> let alone that the absences were or should have been unexcused.

Bordson also makes much of the fact that a supervisor may reverse a foreman's designation of an absence as unexcused and that this was not done. The ordinance does not, however, require that an employer excuse an absence which would otherwise be unexcused because the absence resulted from an employee's arrest. It simply prohibits an employer from treating an employee who has an arrest record less favorably than other employees because of his arrest record. It does not require accommodation of absences caused by an employee's arrest. Thus, Oscar Mayer's refusal to reclassify absences which were initially classified unexcused consistent with its non-discriminatory, albeit subjective, policy and practice does not violate the ordinance.<sup>6</sup>

Dated at Madison this 29th day of September, 1989.

#### EQUAL OPPORTUNITIES COMMISSION

Harold Menendez  
Hearing Examiner

---

<sup>1</sup>Jim Hughes, Connie Faust and Michael Murphy all testified that there is a practice of excusing absences which do not affect operations and not excusing those which leave a shift or a line short-staffed and disrupt operations. Their testimony in this regard is undisputed.

<sup>2</sup>Bordson's opinion as to whether his absences ought to have disrupted operations is insufficient to overcome Hughes' direct testimony, based on personal knowledge, as to the effect Bordson's absences actually had on June 25 and June 26. Bordson's opinion was also controverted by Faust's testimony as to the effect an absence can have.

<sup>3</sup>Any two day combination of AWOL and unexcused absences is also grounds for discharge.

<sup>4</sup>When a case is fully tried and the employer has advanced a legitimate, non-discriminatory reason for its actions, we are in a position to directly decide the ultimate question of discrimination. Aikens, 460 U.S. at 715. In this setting we focus on the employer's explanation and decide whether it is a pretext for discrimination. B. Scheli and P. Grossman, Employment Discrimination Law (2d Ed. Supp. 1983-84) p. 251-52. Pretext may be proven by showing that a discriminatory reason more likely motivated the employer or that the explanation proffered by the employer is unworthy of credence. Burdine, 450 U.S. at 256.

<sup>5</sup>The only exceptions are David Hendricks, who had prior approval for his absences, and an employee by the name of Thomas. He had arranged for a substitute and also had prior approval for his absences.

<sup>6</sup>The third step grievance decision is also cited by Bordson as proof that Oscar Mayer discriminated against him because of his arrest record in refusing to excuse his absences. As noted above, the ordinance did not require that Oscar Mayer excuse Bordson's absences. Moreover, the third step grievance decision was an intermediate level decision and was superceded by the denial of the fourth step level. There is no evidence that the denial of Bordson's grievance at the fourth

(and presumably final) step was influenced by an animus toward Bordson because of his arrest or by hostility toward persons with an arrest record in general.