

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

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| <p>Bradford McKoy 3 Gale Ct. Madison, WI 53704</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Prange Way 2901 N. Sherman Ave. 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</p> <p style="text-align: center;">Case No. 21639</p> |
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This matter came on for a public hearing before Madison Equal Opportunities Commission Hearing Examiner, Clifford E. Blackwell, III, on July 13, July 14, August 30 and August 31, 1993. The Complainant, Bradford M. McKoy, appeared in person and by his attorney, A. Steven Porter. The Respondent, Prange Way Inc., appeared by its Director of Assets Protection, Terry Gerrits, and by its attorney, Kristine Stampen of the law firm of Stolper, Koritzinsky, Brewster and Neider S.C. Based upon the record of these proceedings, the Hearing Examiner makes the following Recommended Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. The Complainant is a Black or African American male. His date of birth is February 19, 1974.
2. The Respondent is a corporation engaged in the retail sale of general merchandise. At the time of hearing, it operated a chain of 24 stores in Wisconsin and Minnesota including four stores within the City of Madison. One of its stores is located on North Sherman Avenue and is designated within the company as store 241.
3. The Complainant began working for the Respondent in April of 1990 in the garden center. He was terminated on January 29, 1992. At the time of his termination he was assigned to the electronics/camera counter as a Sales Associate. During his employment, the Complainant worked in several different areas but always in a sales capacity.
4. Until November, 1991, the Complainant performed his work at least adequately. During his employment, he received two increases in pay in the form of merit increases. Prior to January 29, 1992, the Complainant had not received any form of discipline during his employment.
5. In late November, 1991, Betty Zander, Respondent's manager of detectives at the North Sherman store was informed that there had been a series of shortages on cash register 10. This is the cash register used by the Complainant in the electronics/camera area. Zander undertook an investigation to determine whether the shortages could be explained or if they were a result of employee theft. She determined that the shortages were likely the result of employee theft. She reviewed the documentary evidence available to her to see if a common denominator could be identified.

6. A common denominator is an employee or employees who can be tied to all or a significant number of the dates upon which shortages occurred. Investigation may identify one or more common denominators.
7. As a result of this investigation, Zander initially identified 9 employees but narrowed identification down to two possible suspects or common denominators. One of these suspects was the Complainant. On or about December 14, 1991, Zander, in connection with her supervisor, Patrick Lamb, decided to place the Complainant's cash register under surveillance. This surveillance was to be by closed circuit television and video tape. The camera was put in place after close of business on December 14, 1991. The camera was to operate from the opening of the store until the close of the store beginning on December 15, 1991. The camera malfunctioned on December 15, 1991 and no tape is available for the events of that day.
8. During his morning break, the Complainant and a coworker, Daryl Franklin, were overheard by Gretchen Haugen talking about gambling and gambling losses. Haugen believed that she heard the Complainant state that he had recently lost a large sum of money playing "craps". Shortly after that conversation, the Complainant went into and came out of the employee men's bathroom. Shortly after the Complainant left the men's bathroom and before any other person entered the bathroom, Ray Skawinsky, a coworker of the Complainant's, entered the bathroom. Upon leaving the bathroom, Skawinsky showed Haugen a one hundred dollar bill that he had found on the bathroom floor. It had been folded or crumpled into a small wad and had been found slightly under one of the basins. Haugen took possession of the bill and asked Skawinsky not to mention the incident.
9. The Complainant shortly thereafter asked to go home early because he was not feeling well; he did leave early. Once he left, his register was audited. This audit revealed that the Complainant's register reflected a single transaction in which a one hundred dollar bill had been tendered. This transaction occurred at or about 10:19 a.m. This was at a time when the Complainant was signed on to the register. The audit also demonstrated that the Complainant's register was just under one hundred dollars short for the day.
10. When a Sales Associate begins his or her shift and is responsible for the register, he or she enters an up to four digit number in the register. That number remains in the register and is imprinted on all transactions so long as it remains in the register. A Sales Associate is instructed to keep his or her number confidential. A Sales Associate is to remove his or her number from the register any time that he or she is away from the register or if another Sales Associate wishes to use his or her register to ring up a sale. These precautions are often disregarded by the sales associates.
11. The other possible common denominator for the shortages in November and early December was not at work on December 15, 1991. Despite the malfunction of the surveillance equipment on December 15, 1991, surveillance was maintained on register 10. Additionally, the Complainant was specifically placed under surveillance.
12. On December 17, 1991, two more dates with shortages were identified. The Complainant was the only common denominator for the entire series of shortages on register 10 for the period of November 1, 1991 to December 15, 1991. The surveillance of register 10 and the Complainant were continued until January 29, 1992. Neither of these surveillances disclosed any additional incidents of shortages.
13. On January 29, 1992, Lamb and Zander met to discuss the lack of results of the surveillance and to determine how to bring the investigation to a conclusion. They were both frustrated because they believed that the Complainant was responsible for the shortages but lacked an actual observation of wrongdoing. They decided to interview the Complainant about the incidents. It was decided that the Complainant's father, Travis McKoy should be notified of the suspicions before interviewing the Complainant. This decision was made to avoid embarrassing

the elder McKoy. Travis McKoy is a City of Madison police officer who has had a long and positive professional relationship with the Respondent.

14. Travis McKoy was disturbed by the allegations of wrongdoing by his son but felt that it would be inappropriate for him to be directly involved and indicated that he would tell his wife, Rochelle McKoy, about what was happening. At 5:30 p.m. on January 29, 1992, the Complainant and his mother came to the North Sherman store to discuss the allegations against him.
15. The Complainant and his mother were shown to Gretchen Haugen's office where they met Patrick Lamb, Betty Zander and Pam Foot. Mrs. McKoy and Lamb remained in Haugen's office while the Complainant, Zander and Foot went to the Security Office. Zander and Foot questioned the Complainant about the December 15, 1991 incident. He denied any knowledge of the hundred dollar bill. After some period of time, Lamb came into the office and asked how things were going. Zander indicated that the Complainant denied responsibility. Lamb then confronted the Complainant in an aggressive and bullying manner. Lamb stated among other things that he would not play games any more, that he knew that the Complainant had done it, that the Complainant's parents were upset and that the Complainant should put this behind him and admit his guilt. The Complainant continued to deny responsibility.
16. Lamb left but returned after a short break. He continued to badger the Complainant. Eventually, the Complainant stated that if they wanted him to say that he had done it then he did it. Zander then asked him about other dates upon which shortages occurred. The Complainant admitted to taking an additional twenty dollars but could not identify the date when he took it. He refused to admit to any other thefts. Lamb returned and indicated that if he would not cooperate the Respondent would prosecute. When it became obvious that the Complainant would not admit to any other thefts, Lamb left stating that the Respondent would prosecute. The Complainant's employment was terminated at the end of his interrogation.
17. During the time that the Complainant was at the Respondent's offices on January 29, 1992, his two brothers, LaMar and CJ (Cedric), came to find out what was happening. LaMar had been employed as a security detective by the Respondent at the North Sherman store for approximately two years ending at the end of 1990. The Complainant's brothers arrived after the Complainant had told Lamb that he had taken the one hundred dollar bill. The Complainant denied to his brother LaMar that he had taken any money. This recantation occurred in front of Lamb.
18. During his interview and interrogation, the Complainant offered several plausible alternative explanations to account for the shortages other than his stealing of the money. He was told that the Respondent would continue its investigation. LaMar McKoy, who at first believed that the Complainant had been observed taking money, later questioned Lamb about the investigation's thoroughness once he learned that there were no direct observations of wrongdoing on the part of the Complainant. He too was told that the Respondent would continue its investigation.
19. The Respondent filed a complaint seeking the prosecution of the Complainant for theft. The Respondent aggressively pursued the complaint with the police department and the District Attorney's office. The criminal complaint was resolved by the Complainant's plea of no contest to a county citation for disorderly conduct, his payment of \$500.00 in restitution and a civil forfeiture and court costs.
20. In the five years prior to the Complainant's dismissal, the Respondent terminated 16 other employees for dishonesty. These included 15 White employees and one Black or African American employee. These employees were dismissed for cash thefts, theft of product or price switching. All of the employees who were dismissed for theft of cash were directly observed taking cash on one or more occasions. There is no information concerning the fate, the number

or the race of employees who were suspected of cash thefts but for which there was no direct observation of theft.

21. The Respondent generally follows a process of progressively intensive investigations for allegations of employee theft. This begins with document reviews to ascertain whether there are common employee identification numbers present on the days where losses have occurred. The next step is to place the common denominator(s) or their cash registers under surveillance. If this surveillance discloses wrongdoing, the employee is interviewed with the goal of obtaining a verbal and eventually a handwritten admission of guilt. This pattern cannot always be followed because of the circumstances of each case.
22. The Complainant believes that his race was a factor in the manner in which he was treated.
23. Under the general standards of the assets protection profession within the retail industry, most detectives would not have interrogated, interviewed or terminated the Complainant on January 29, 1992. However, it was not unprofessional for the Respondent to have done so.
24. The Respondent's investigation was not as complete or thorough as it should have been. It did not take into account the possibilities of the explanations for the shortages provided by the Complainant or those suggested at the time of hearing by John Maasch.
25. The Respondent has a policy of referring for prosecution all cases of employee dishonesty justified by the facts of each case. The Respondent truly believed that the Complainant had stolen from Respondent and that the Complainant had admitted such theft during his questioning on January 29, 1992.
26. The Complainant's race was not a factor in the Respondent's handling of the investigation, its decision to terminate the Complainant or its decision to refer the Complainant for prosecution.

CONCLUSIONS OF LAW

27. The Complainant is a member of the protected class "race" because he is an African American.
28. The Respondent is an employer within the meaning of the ordinance and conducts business within the City of Madison.
29. While the Complainant may have been treated unfairly by his employer, the Respondent legitimately believed that the Complainant had stolen from it. It was because of this belief that the Respondent terminated the employment of the Complainant.
30. The Complainant's race played no part in the Respondent's decision to investigate him, to terminate his employment or to refer his complaint for prosecution.

ORDER

31. The complaint is dismissed without costs to either party.

MEMORANDUM DECISION

This case involves the termination from employment of the Complainant. The Complainant alleges that his race was a factor in the decision to terminate him. The Respondent asserts that the Complainant's race played no part in his termination and that instead, the Complainant was terminated because the Respondent had a reasonable belief that the Complainant was guilty of stealing from the Respondent. Whether the Complainant was guilty of theft is not an issue in this matter. The real question for the Hearing Examiner is whether the Complainant was treated differently than other employees not of his race where there has been an allegation of employee theft.

The Complainant, an African American male, began working for the Respondent at its Sherman Avenue store in March of 1990 while he was in high school. He began employment as a sales

associate in the garden department. Over the period of his employment, he worked in various areas but always as a sales associate. In late 1991, the Complainant worked in the electronics and camera department. He was generally a good employee receiving favorable evaluations and pay raises.

The Respondent is a retailer of general merchandise with stores throughout Wisconsin. At the time of hearing, the Respondent operated four stores within the City of Madison. It employed many persons. As a retailer, the Respondent has reduced the number of stores and employees.

In late November, 1991, Betty Zander, manager of detectives at the Sherman Avenue store, was informed of several incidents of shortages of cash on register 10 in the electronics and camera area. She examined the receipts to determine whether there was an explanation of these losses other than employee theft. Zander determined that theft was the likely explanation. She conducted additional investigations to identify which employees might be suspects. Her investigation revealed that only the Complainant and one other employee were present at the store on all of the days for which there were shortages. Initially Zander identified as many as nine possible suspects but narrowed that number through further cash register audits.

On December 14, 1991 Zander met with her supervisor, Pat Lamb, to discuss the investigation. On that date they decided that they would conduct video surveillance of cash register 10. Video cameras were installed that evening to begin operation the next day.

On December 15, 1991 a one hundred dollar bill was found by another employee in a bathroom recently used by the Complainant. The Complainant had asked permission to leave for the day because of illness at about the same time. This permission was granted and the Complainant's cash register was immediately audited. This audit revealed that the Complainant's register was short just under one hundred dollars and that amount was attributable to a transaction in which a one hundred dollar bill was tendered.

The video camera installed on December 14, 1991 malfunctioned. As a result of the malfunction, there was no observation of the incidents on December 15, 1991. The store manager on that date stated that she heard the Complainant and another employee discussing gambling losses. The Complainant specifically stated that he had recently lost money playing craps. This discussion was overheard on the morning of December 15, 1991.

During the period of the surveillance, the Respondent performed additional audits on the registers worked by the Complainant. These audits demonstrated that the Complainant was the only employee who worked on all of the dates where the registers were short. This form of analysis looks for common denominators in employees working on days of shortfalls. This includes cash office associates as well as sales associates. As of the institution of video surveillance, the Respondent had not yet identified a single common denominator for the shortfalls. On December 17, 1991, the Respondent's audits identified two additional days on which the Complainant's cash register was short. The Complainant was the only employee whose work schedule was common to all days of loss. The other employee who had been suspected as of December 14, 1991, did not work on December 15, 1991 or the dates identified on December 17, 1991.

After the initial failure of the video surveillance equipment, the camera was operated consistently until January 29, 1992. During this period of observation, no additional losses were observed.

On January 29, 1992, the Respondent's assets protection personnel, particularly Patrick Lamb, were becoming increasingly impatient to draw the investigations to a close. On that date Lamb and Zander

met to discuss the lack of progress. Despite having not directly observed evidence of wrongdoing, Lamb sought to confront the Complainant. Lamb was convinced that the Complainant was guilty.

Because of a long-standing and respectful relationship between the Respondent and the Complainant's family, Lamb contacted the Complainant's father, Travis McKoy, to seek his advice about how to handle the situation. Travis McKoy is a City of Madison police officer who has worked with the Respondent for a considerable period of time with respect to theft and other loss issues. Additionally, the Complainant's older brother, LaMar McKoy, had been employed by the Respondent as a security officer in the area of assets protection. LaMar McKoy was well thought of as an employee of the Respondent. He seems to have held his supervisor, Betty Zander, in some high regard. It was due to this history of good working relations with the Complainant's family that Lamb wished to consult Travis McKoy before taking further action.

At the meeting between Lamb and Travis McKoy, McKoy indicated that he was uncomfortable being involved because of his professional conflict. Lamb had presented the Respondent's belief that the Complainant had been stealing from the Respondent and the evidence to support that belief. Travis McKoy spoke with his wife, Rochelle McKoy, and explained the circumstances to her. She found the Complainant at home after her conversation with Travis. The Complainant and his mother then went to the Sherman Avenue store to attempt to resolve the suspicion surrounding the Complainant. Lamb, Betty Zander and Pam Foot met with the Complainant and his mother. Initially the Complainant and his mother met together with the representatives of the Respondent in the manager's office. However, shortly after beginning the meeting, the Complainant and his mother were separated and interviewed in different rooms. Lamb spent the majority of his time with the Complainant's mother. Zander and Foot questioned the Complainant.

Lamb told Rochelle McKoy, the Complainant's mother, of his suspicions of the Complainant and why he believed the Complainant to be guilty of stealing from the Respondent. Rochelle McKoy was greatly upset by what she heard. She offered to pay restitution for the missing amounts. She indicated that she had been concerned about the Complainant's recent conduct and the amounts of money that he had spent on Christmas gifts. She was not given the opportunity to discuss Lamb's allegations with the Complainant. Zander and Foot questioned the Complainant in the security office. The Complainant denied any thefts or knowledge of thefts. He offered several explanations of the losses including other employees who might have been responsible. After Lamb had spoken with the Complainant's mother, he joined Zander and Foot. He was told that the Complainant denied any responsibility for the losses.

Lamb aggressively questioned the Complainant about the losses and his part in those losses. The Complainant continued to deny any involvement.

Lamb left for a short period and then returned. He continued to attempt to intimidate the Complainant by stating that Lamb and the Complainant both knew that the Complainant was guilty. He also indicated that the Complainant's parent's thought that the Complainant was guilty and that he should put this incident behind him and come clean.

Eventually the Complainant told Lamb, Zander and Foot that if they wanted him to say that he had taken the money then he would say that he had. This less than voluntary admission was to only one particular loss, that of the one hundred dollar bill on December 15, 1991. Zander and Foot continued to question the Complainant and again he admitted to taking another \$20.00 though he could not identify when this theft might have occurred. However, the Complainant refused to admit any

responsibility for the remaining approximately \$530.00 that the Respondent suspected him to have taken.

During the period of his questioning but after his "admission", the Complainant's brothers, LaMar and CJ, were permitted to speak with the Complainant. They urged the Complainant to tell the truth but not to admit anything for which he was not responsible. LaMar initially believed that the Complainant had been directly observed taking money from his cash register. This was not the case. LaMar McKoy discussed his concerns about the inadequacy of the investigation with Lamb. Lamb indicated that they would continue to look into the losses. LaMar could not state that the Respondent's actions were based upon his brother's race.

The Complainant and his mother were eventually brought together again. Lamb indicated that they would continue the investigation of the losses because the Complainant would not admit to theft of the total amount. The Complainant was terminated from employment. The Respondent then referred the losses to the police department for investigation and prosecution of the Complainant for retail theft.

The Respondent aggressively followed up the police department's investigation of the complaint and the eventual referral of the complaint to the Dane County District Attorney's office. The Complainant and the Dane County District Attorney's office reached an agreed resolution whereby the Respondent was paid restitution in the amount of \$500.00. The Complainant did not admit to any theft as part of this resolution. He did enter a no contest plea to a County charge of disorderly conduct.

The Respondent has a history and practice of forcefully pursuing all incidents of suspected theft or wrongdoing by employees or customers. It uniformly refers all such incidents for prosecution. Not all such referrals result in conviction or even prosecution. The police department and District Attorney's office retain discretion to pursue or not to pursue any specific case. In pursuing such cases, the Respondent attempts to gain direct evidence of the wrongdoing such as eyewitness observation or video tape evidence. The Respondent also seeks to obtain a handwritten admission of guilt by the suspect. Not every case results in both of these outcomes, depending upon the circumstances of the individual case.

The Complainant asserts that the manner in which he was treated was different from that in which other employees similarly situated were treated. The Complainant alleges that this difference occurred because he is an African American. To this end, the Complainant points to a list of five other discharged employees all of whom are White. These cases deal only with thefts from cash registers in the years 1987 through January of 1992. There were an additional eleven cases presented that dealt with theft of merchandise or price switching. He argues that in each instance of alleged thefts the employees were observed in the act of wrongdoing and provided a written admission before they were terminated and prosecuted. The Complainant points out that in his circumstance, there was no observation of his actually taking any money and he never provided or was requested to provide a written admission of wrongdoing. The Complainant now contends that his verbal admission of stealing approximately \$120.00 was given only because he was pressured by Lamb to admit to some wrongdoing.

In opposing the Complainant's complaint of discrimination, the Respondent asserts that it had a reasonable belief that the Complainant was guilty of stealing from it. The Respondent states that it took necessary professional steps to determine whether the Complainant was responsible for the losses it experienced and that it did not treat the Complainant differently from other employees not of his race.

The Commission utilizes the McDonnell-Douglas/Burdine paradigm as amended by subsequent decisions for analyzing cases of employment discrimination. McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); Saint Mary's Honor Center v. Hicks 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). In this analytical structure, the Complainant must first set forth a prima facie case of discrimination. Proof need not be by direct evidence but can be by circumstantial evidence. Assuming that the Complainant meets this initial burden, the Respondent must be able to state a legitimate nondiscriminatory reason for its actions. This is a burden of articulation and not one of proof. If the Respondent is able to state such a reason for its actions, the burden shifts back to the Complainant to demonstrate that some other discriminatory motive was really behind the Respondent's actions or that the Respondent's stated reason is not worthy of credence. The Complainant must ultimately bear the burden of demonstrating discrimination.

In order to move past the first step in this framework, the Complainant must have shown that: 1) He is a member of a class protected by the ordinance. 2) The Respondent is an entity subject to the requirements of the ordinance. 3) He was qualified for the position that he held. 4) He suffered some adverse employment action. 5) The adverse action that he suffered was at least in part motivated by his membership in a protected class. Most of these elements are not in dispute in this case.

The Respondent does not contend that the Complainant, an African American, is not a member of the protected class, race. Equally, there is no question that the Respondent is subject to the regulation of the Commission. It is a large retailer employing many persons within the City of Madison. The Complainant had been hired by the Respondent as a sales associate and had held that position for a number of months prior to his termination. He had received adequate evaluations and at least two pay increases during the period of his employment. Other than the allegations that bring the parties before the Commission, there is nothing in the record to indicate that the Complainant was not qualified for the position that he held. Equally, there can be no disputing that termination from employment is not an adverse action. The real issue for determining whether the Complainant has met his burden for proving a prima facie case of discrimination is whether there is evidence in the record that supports a preliminary finding that the Complainant's race was at least in part a reason for the Respondent's termination of his employment. The record contains such evidence. The record shows that the Respondent almost invariably obtains a written admission of wrongdoing before terminating an employee. Also, in almost all of the cases reviewed by the witnesses at hearing, the employee was directly observed in the act of committing a theft or similar act. Despite this strong pattern of action, not all cases of employee wrongdoing fit this pattern. All but one of the cases of employee theft or wrongdoing presented at hearing involved White employees. In the case at hearing, the Complainant, an African American, was terminated despite not having been directly observed stealing money and not having first provided a written admission of wrongdoing.

The Respondent points to individual cases in the sixteen that were presented during the hearing to demonstrate that the two standards of direct observation and handwritten admissions were not universal. While the Respondent's position has support in the record, at this stage of analysis, it is insufficient to persuade the Hearing Examiner. The overwhelming majority of cases involving White employees shows that the Respondent only acted after the suspected employee had been observed stealing and had provided a handwritten admission. This is particularly true in the case of theft from cash registers. There are, of course, exceptions where the wrongdoing was not detected until after the fact such as in the cases of price tag switching or returning a sale item for the full price. In cases where the wrongdoing could be observed, action was taken when there was a witness and an written admission was provided. These circumstances give rise to a reasonable belief that the Complainant

was treated more harshly because of his race than other similarly suspected employees, the overwhelming majority of whom were White.

Proof of all of the elements of a prima facie case does not by itself lead to the conclusion that the Complainant must prevail on his claim of discrimination. The Hearing Examiner must consider whether the Respondent has stated a legitimate nondiscriminatory reason for its termination of the Complainant. The Respondent asserts that it had a legitimate, nondiscriminatory belief that the Complainant had stolen money from it. The Respondent states that it was this belief in combination with the Complainant's verbal admission of theft at the January 29, 1992 confrontation that led it to terminate the Complainant. Since the Respondent's burden is one of production or articulation at this stage, the mere assertion that this was the basis of the Respondent's action would be sufficient to shift the burden back to the Complainant. However the Respondent has provided testimony to support its position.

The Respondent's witnesses testified that the Complainant had become one of the foci of an investigation into shortages on cash register 10 before the December 15, 1991 incident. This investigation began in November of 1991, three or four weeks prior to the incident with the one hundred dollar bill. There was testimony that on December 14, 1991, there was sufficient evidence of the Complainant's guilt to warrant placing the Complainant's work station under video surveillance. From the testimony at hearing, it appears that the Respondent became convinced that the Complainant was the only realistic suspect on December 17, 1991 when it discovered additional shortages on days where the Complainant was the only suspect to have worked. Similarly the incident on December 15, 1991 involving the one hundred dollar bill pointed to the Complainant as being responsible for earlier losses because the other suspect was not at work on December 15, 1991. Even though this information is all circumstantial and might be insufficient to result in a criminal conviction, it demonstrates the Respondent's reasonable belief that the Complainant had been stealing from the Respondent. Termination of an employee for theft clearly represents a legitimate, nondiscriminatory reason for terminating the Complainant's employment.

Given the Respondent's demonstration of a legitimate, nondiscriminatory reason for its termination of the Complainant's employment, the burden shifts to the Complainant to demonstrate that the reasons stated by the Respondent are either not worthy of credence or are otherwise a pretext for some other discriminatory motive. It is insufficient for the Complainant to merely show that the Respondent has lied about its reasons, he must affirmatively demonstrate that the Respondent had at least some discriminatory intent in taking its action. Burdine, supra; Saint Mary's Honor Center, supra. In essence, this brings the Hearing Examiner to the point where he must, looking at the record as a whole, determine whether the record supports a finding of discrimination. United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983).

The sole thrust of the Complainant's argument is that the Respondent varied from its policies or procedures as stated by its assets protection manager, Terry Gerrits. Those procedures call for an increasingly focused investigation where there are allegations of theft on the part of an employee. This process begins with a review of cash register tapes to determine whether there is an actual pattern of theft or isolated explainable errors. Once there is evidence of theft, there is an evaluation of the cash register tapes to see if there are one or more employee identification numbers in common for the days on which there is a loss. If such a common denominator can be identified, the employee or employees in question are placed under surveillance either by direct observation or by video camera. If wrongdoing is caught directly or on tape, the employee or employees are interviewed and confronted. In that interview a verbal admission and eventually a written admission are obtained. Under these circumstances, the employee is terminated and the case referred to prosecution.

The Complainant asserts that the Complainant should not have been interviewed because there was no direct evidence that he was responsible for the losses identified by Zander and Lamb. He argues that the lack of video tape evidence of theft from his cash register from December 15, 1991 through January 29, 1992 should have precluded his interview on January 29. He points particularly to the five other cases of theft from cash registers dating back to 1987. In all of these cases, the employees, who were White, were not interviewed or terminated until there was direct observation or video tape evidence of wrongdoing. The Complainant's expert witness, John Maasch, indicated that most assets protection officers would not have considered there to have been enough evidence to warrant the interview.

The Complainant ignores the fact that he and his mother went voluntarily to the Sherman Avenue store on January 29, 1992 to "straighten" things out. Though the Complainant was aggressively questioned by Zander, Foot and Lamb, he could have left at any time. The Hearing Examiner does not intend to minimize the difficulty of doing this, particularly for a young, unrepresented person, but the fact remains that the Complainant had not been arrested or detained. He was there because he or his mother wanted to clear the air. While it is true that Lamb had spoken with the Complainant's father earlier on January 29 to see about interviewing the Complainant, the Complainant did not have to go or to stay once there. This represents a significant difference from the other circumstances of cash register theft pointed to by the Complainant.

The Complainant's own witness, Maasch, stated that even though he would not have conducted the interview under the same circumstances, it was not unprofessional for the Respondent's assets protection personnel to have done so. Additionally, the Complainant has chosen too narrow a group to which to compare the Complainant's treatment.

The Complainant utilizes a group of five former employees whose offense was identical to his. The universe of possibly comparable actions over the five years prior to the Complainant's termination includes other types of offenses. The record contains the details of sixteen other employees who were terminated for misconduct in the nature of theft or fraud. In several of these cases the employees were interviewed and terminated without there having been any direct observation of their wrongdoing.

It is not realistic to expect an employer to wait for direct or video tape observations of employee wrongdoing. Several witnesses testified that a pattern of shortages or theft may suddenly stop. The reason for this action may be fear of the thief that he or she might be caught or a perception that the Complainant is under surveillance. In either event, the employer would still have a legitimate interest in determining responsibility for the losses that have already occurred. The employer also has an interest in keeping the losses from reoccurring and in deterring theft by other employees. In this case, the Respondent could understandably have wished to recover the almost \$650.00 that had been lost in 1991. The Respondent's progressively strict procedure for investigating allegations of employee theft must be viewed in terms of a guideline and not as a mandatory requirement. Clearly the Respondent operates in this manner given the fact that in some of the case histories presented at hearing, employees were questioned and terminated without there having been a direct observation of wrongdoing. Obviously, it presents a stronger case for eventual prosecution if one has been caught in the commission of a crime but it is clearly not necessary for successful prosecution. To require an employer to hold to a standard requiring direct observation would hold the employer to a higher standard than that of the civil rights plaintiff. As the Complainant points out in his brief, the law recognizes the difficulty in obtaining direct evidence of discrimination and thus permits proof by circumstantial means. This would be similar to what the Respondent did in this case. The standard urged by the Complainant would work to the advantage of the "smart" or careful thief. If one can

avoid direct observation, they cannot be questioned or fired even if they were the only person who consistently worked on the day of the thefts.

The Complainant asks the Hearing Examiner to find that there was discrimination on the sole basis that he is an African American who may have been treated differently from a group of other employees. He does not recognize that the evidence may support other inferences regarding his treatment and fails to address the issue of whether the difference in treatment resulted from his race or from some other reason. The only effort made by the Complainant to address some of these counterarguments stems from the fact that Patrick Lamb was convinced that the Complainant was guilty of theft prior to interviewing him on January 29, 1992 and this belief affected Lamb's questioning of the Complainant. There is nothing in this record to indicate that Lamb held any racial animus towards the Complainant at all. Lamb may be guilty of a high degree of zealotry in performing his job and perhaps in a lack of judgment or sensitivity in how to question a young, unrepresented person but this falls short of demonstrating racial animus.

Prior to the interview of the Complainant, on January 29, 1992, Lamb spoke with the Complainant's father, Travis McKoy, a City of Madison police officer. Lamb asked what McKoy would do under the same circumstance. McKoy indicated that an interview would be appropriate.

This conversation was the subject of considerable conflict in the briefs of the parties. The Respondent contends that it showed a certain solicitude to the Complainant's family given both Travis and LaMar McKoy's past positive connections with the Respondent. The Complainant argues that this solicitude demonstrates the lack of a discriminatory motivation on the part of the Respondent. The Complainant asserts that it is at best a neutral fact making reference to hypothetical treatment of slaves in the past. The record in this matter more supports the reading given by the Respondent. There can be no real dispute that prior to this incident the McKoy family was held in high regard by the assets protection personnel of the Respondent. Equally, it appears that both Travis and LaMar McKoy had some regard for the employees of the Respondent with whom they had contact. Given this history, the Complainant's comparison of the Respondent with a hypothetical beneficent plantation owner was inappropriate. The record, when taken as a whole, convincingly portrays the Respondent to be an aggressive and bullying employer when it comes to employees that it believes to be guilty of stealing from it. This is true of White employees as well as African American employees. There was testimony about the extensive efforts taken by the Respondent's assets protection personnel to gain admissions from suspected employees. In one such incident involving a White employee, the Dane County District Attorney's office refused to prosecute the referral because the assets protection officer detained an accused employee for several hours past closing in order to gain an admission. Many of the steps taken by the Respondent's personnel in this case could well have resulted in conduct that would have prevented a criminal prosecution. The badgering interrogation by Lamb went on for a questionably long period of time. Lamb clearly used misstatements and lies to gain an admission. However, there is nothing in the record that indicates that Lamb would have treated a White employee any differently. It seems more likely that Lamb intended to use the Complainant's age and relative lack of sophistication to gain an advantage in questioning the Complainant.

The Complainant spends much time in his brief describing the shortcomings of the Respondent's security and investigatory processes. These include the lack of security in the use of employee identification numbers and considering other employees who might have had a motive and opportunity to steal. These shortcomings may be relevant to a criminal prosecution or some effort to ultimately prove that the Complainant was guilty of theft. As noted above, that is not the issue before the Hearing Examiner. There is no doubt that there are things that could have been done to specifically identify the guilty party. However, what the Respondent has demonstrated is that it had a

not unreasonable belief that the Complainant had stolen from it and it acted on that basis. An employer can act with less than complete knowledge so long as discrimination does not taint its decision. Nothing in this record indicates that the Complainant's race did affect the Respondent's decision.

The only witness whose credibility might be questioned by the Hearing Examiner is the Complainant. He delivered his testimony in a quiet and unsteady voice. From time to time his answers were evasive. This is particularly true with respect to his efforts to find employment after he was terminated. These evasions have given the Hearing Examiner some doubts about the extent and accuracy of the Complainant's memory and testimony. However, these doubts are not sufficient to automatically disregard the Complainant's claim. The expert witnesses for both sides, John Maasch and Terry Gerrits, were both professional and credible.

To the extent that this case accurately depicts the Respondent's attitude towards its employees and the hardline and uncreative approach of its assets protection personnel, it is not difficult to understand its apparent loss of market share. Such attitudes cannot instill much loyalty in one's employees. Despite this "us versus them" attitude, the Hearing Examiner must conclude that the Complainant's race was not a factor in the Complainant's termination.

For the reasons set forth above, the complaint is dismissed.

Dated this 31st day of January, 1995.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner