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

James Maas PO Box 14672 Madison, WI 53714 Complainant vs. Woodman's 3817 Milwaukee Street Madison, WI 53714 Respondent	HEARING EXAMINER'S RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 21724

A public hearing on this complaint commenced at 8:30 a.m. on December 15, 1992. The hearing, at the end of the first day of testimony was continued to January 22, 1993 and was concluded on February 26, 1993. The parties then submitted briefs and arguments in support of their respective positions. The Complainant, James Maas, appeared in person and was represented by his attorney, Willie J. Nunnery. The Respondent appeared by one of its owners, Willard P. Woodman, and by its attorneys, Boardman Suhr, Curry and Field by Bonnie A. Wendorff. Based upon the record of these proceedings and the arguments of the parties, the Hearing Examiner makes his Recommended Findings of Fact, Conclusions of Law and Order as follows:

RECOMMENDED FINDINGS OF FACT

1. The Complainant describes himself as being a mulatto, a person of mixed racial heritage. The Respondent is a Wisconsin corporation that operates two stores within the City of Madison. One, which is designated as Store 16, is known as Woodman's-East and is located at 3817 Milwaukee Street in the City of Madison.

3. Dave Wagner was the manager of Store 16 at all times relevant to this complaint. At the time of the hearing in this matter, Wagner had been employed by the Respondent in various capacities for approximately the past 14 years. He had been the manager of Store 16 for about the past 4 years. Prior to becoming the manager, Wagner was the third shift supervisor at Store 16.
4. The Complainant's immediate supervisor at the time of hearing was Rodney Kellerhuis. While working in the Respondent's warehouse, the Complainant was supervised by Jerry Kratochtwill.
5. The Respondent's corporate offices are located in Janesville, Wisconsin. These offices maintain most corporate records including personnel records for each employee. It is the responsibility of employees in the Janesville office to review the time records of each employee and based upon these records forward to the appropriate store managers proposed discipline where the records demonstrate a violation of the Respondent's policies or procedures. The store managers have discretion to issue discipline at the proposed level, a different level or to vacate the proposed discipline. The store managers can initiate discipline where the violation is primarily a local matter such as theft or fighting.

6. The Respondent rigorously enforces its attendance policy. An employee may be disciplined for, at a minimum, being late, returning to work late after a break or failing to appear for work without calling or without an excuse.
7. The Respondent generally follows a "progressive" pattern of discipline. First offenses may result in a verbal warning. The next level of discipline is a policy reminder, followed by a 1 day disciplinary layoff (1 DLO). The next level provides for a 3 day disciplinary layoff (3 DLO). The final step in the progression is termination of employment. When considering the appropriate level of discipline, the manager will generally look at other disciplinary actions taken within the past year. After one year of no violations of policy, an employee's record is generally wiped clean. This period was extended from 6 months of good behavior during the Complainant's employment. Discipline may also be reduced or repeated for lesser periods of "good behavior", rather than moving to the next level of discipline.
8. The Complainant began his employment with the Respondent at Store 16 in June of 1989 as a Utility Clerk. The usual progression of employment is Utility Clerk, Department Clerk and Clerk. A Utility Clerk works primarily as a checker, bagger or information counter attendant. A Department Clerk may stock non-food items while a Clerk may stock any item in the store. The Complainant made this progression and at the time of his termination on May 22, 1992, he was a Clerk on the third shift in the Dairy Department.
9. Within the first six months of his employment, the Complainant began to have attendance problems. The problems continued into the next year and the Complainant was close to termination in the Spring of 1990. At that time, it was discovered that the Complainant had a sleep disorder that partially caused the attendance problems. The Respondent indicated that it would allow the Complainant to be late pending resolution of the sleep disorder. After several weeks, the Complainant notified Wagner that he no longer needed to be accommodated. During this period of accommodation, the Complainant had no violations of the attendance policy.
10. In the second half of 1990, the Complainant began to have attendance problems again. The problems continued and accumulated into 1991. By March or April of 1991, the Complainant once again faced termination as a result of his continuing violations of the attendance policy. Wagner inquired of the Complainant whether he was experiencing a recurrence of his sleep disorder. The Complainant assured Wagner that he was not. After discussing the situation with Willard Woodman, the Respondent's president, Wagner decided to terminate the Complainant for his level of violations. The Complainant and his union grieved the termination. After further discussions with Woodman, Wagner reinstated the Complainant.
11. After each incident where the Complainant faced termination, his attendance would improve for a short period of time. This occurred again in the Spring of 1991. By the end of the summer of that year, the Complainant again began to experience difficulties meeting the attendance requirements of the Respondent. The problems continued into 1992. By April of that year the Complainant again faced termination. In order to indicate the seriousness of the Complainant's position, the Respondent held a meeting on April 6, 1992 with the Complainant and a representative of his union. Similar meetings were held on the same day for other employees, specifically Dave Betts and Anthony Lewis. Betts and Lewis are white. At these meetings, employees including the Complainant, Betts and Lewis were told that their attendance problems were serious and that in order to retain their jobs they would have to keep their records clean for at least sixty days.
12. Neither the Complainant nor Betts were able to keep their records clean for the required sixty days. Both Betts and the Complainant again violated the attendance policy in early May of 1992, Betts on or about May 4 and the Complainant on or about May 6. Lewis had no violations within sixty days of the April 6, meeting.

13. After discussions with Woodman, Wagner excused the early May violations of both the Complainant and Betts. In both cases, Wagner stated that they were being given one last chance and they would have to keep their records clean for an additional sixty days. Betts had no further violations until October of 1992 well beyond the sixty day period. The Complainant had another violation on or about May 22, 1992.
14. The Complainant was terminated on or about May 22, 1992. He sought the assistance of his union. He was told that he would not get his job back simply by filing a grievance as had happened in 1991. He was told that he would not be likely to win his case at arbitration of his grievance because his attendance record constituted good cause for his termination. He was informed that if he filed a discrimination claim that he would probably be offered his job back.
15. The Complainant filed this complaint and was offered his job. After some delay initiated by the Complainant, he returned to work with the Respondent on or about June 30, 1992. He remained continuously employed by the Respondent from that date through the end of the hearing.
16. Lewis was demoted in July of 1992 because he was unable to perform the duties of his job due to an injury that occurred outside of work He had two or three attendance violations after this action. These violations were excused as being necessary to accommodate his injury. Eventually Lewis was placed on a leave of absence because of his injury. At the end of the period designated for his leave, Lewis failed to return to work. After waiting several days for Lewis's return, the Respondent terminated his employment for failing to appear for work as scheduled.
17. Outside of his serious problem with repeated violations of the Respondent's attendance policy, the Complainant was a good employee. All of his evaluations, which were admittedly completed early in his employment, showed acceptable performance. With the notable exception of attendance, the Complainant attempted to be supportive of the Respondent's goals and policies.
18. At some point during his employment with the Respondent, the Complainant reported to Wagner that he believed that he had been called "nigger" by another employee. Wagner promptly investigated the complaint by speaking with the accused employee and attempting to ascertain whether anyone else had overheard the comment. The accused employee denied having called the Complainant "nigger" and Wagner could find no one who had heard such a comment. Wagner knew the accused employee from earlier work experience and believed her account. No further action was taken.
19. The Complainant has been involved in two fights or physical altercations with other employees of the Respondent. He has not been disciplined with respect to either of these incidents. One of these incidents involved an off the premises fight with a white employee who was ultimately terminated as a result of information obtained during the investigation. The other incident involved a shoving match with a black employee in which no one was hurt.
20. The Complainant reported another employee for stealing merchandise from the Respondent. The accused employee was confronted prior to his leaving the premises. This prevented his prosecution for theft. The Complainant did not receive a reward pursuant to the Respondent's reward policy because there was no prosecution of the other employee.
21. During his employment the Complainant was at one time assigned to work in the warehouse. He was transferred from this position because he was not properly performing the duties of the job.
22. The Respondent strictly enforces its attendance policy but does so without regard to the race of the employee. Many other employees including employees not of the Complainant's race have been terminated for fewer violations of the attendance policy.

CONCLUSIONS OF LAW

23. The Complainant is a member of the protected class "race" because he is a mulatto.
24. The Respondent is an employer doing business within the City of Madison and is subject to the jurisdiction of the Commission.
25. The Complainant was not terminated on the basis of his race but was terminated because of his pattern of excessive violations of the Respondent's attendance policy.
26. The Respondent did not violate the ordinance in terminating the Complainant's employment on or about May 22, 1992.

ORDER

The complaint is dismissed without costs to either party.

MEMORANDUM DECISION

The issues for hearing in this matter are relatively straightforward. The complaint raises only the issue of alleged discrimination in his termination from employment with the Respondent. In his brief, the Complainant seeks to raise a new issue relating to the terms and conditions of his employment. This issue is not properly before the Commission. The evidence may be relevant to the question of whether any legitimate, nondiscriminatory reason for the Complainant's termination offered by the Respondent is either not credible or represents a pretext for other discriminatory motives.

The Complainant has not moved the Hearing Examiner to permit the amendment of the Notice of Hearing or the complaint to conform with the proof adduced at the time of hearing. Even if the Complainant had filed such a motion, it seems clear under the requirements of the ordinance and the Rules of the Commission that such a process is not available to the parties. Given this procedural stance, the Hearing Examiner will only consider whether the Respondent discriminated against the Complainant on the basis of his race in terminating the employment of the Complainant. Additionally, if discrimination is demonstrated, the Hearing Examiner will consider what remedy would make the Complainant whole.

There, is no question that the Complainant is a person who is entitled to the protection of the ordinance. He alleged in his complaint and testified at hearing that he is a mulatto. He therefore is a person who could be the subject of discrimination on the basis of race. Further, the Respondent does not contend that the Complainant is not a member of the protected class "race".

Equally, there is no question that the Respondent is an employer and is subject to the requirements of the ordinance. The Respondent is a Wisconsin corporation with five stores in four cities. The Respondent's corporate headquarters are located in Janesville, Wisconsin. The Respondent operates two stores within the City of Madison. They are known as Woodman's-West and Woodman's-East. Woodman's-East is designated by the Respondent as Store 16 and the other store is designated as Store 20. It was at Store 16 that the Complainant was employed. Again, the Respondent does not contend that it is not a proper party in this action. It, of course, contends that it did not discriminate against the Complainant on any basis.

Each store has a manager. The manager is responsible for the operation of that store and, in general, for the personnel matters connected with the store. At the time of hearing, Dave Wagner had been the manager of Store 16 for approximately four years. He had worked for the Respondent in various capacities at Store 16 for the ten years preceding his becoming the manager of the store. At the time of his termination, the Complainant's supervisor was Rodney Kellerhuis. Prior to Kellerhuis, the Complainant worked in the warehouse and was supervised by Jerry Kratochwill.

Generally an employee of the Respondent begins their employment as a Utility Clerk. Utility Clerks bag groceries and on some shifts assist other clerks with various stocking and clearing responsibilities. After a relatively short period of time, typically three or four months, a successfully performing Utility Clerk may be promoted to the level of Department Clerk. Department Clerks are responsible for stocking non-food items within the store. A Department Clerk may eventually be promoted to the position of Clerk. Clerks may stock any item within the store.

Employees do not receive evaluations at regularly scheduled intervals. They are first evaluated at the end of their first thirty days of employment. After this initial evaluation, employees are evaluated only when they change jobs or departments within the store.

All personnel files are maintained at the corporate offices in Janesville. Copies of some personnel records are maintained at each store particularly if there has been some form of discipline issued within a year. General employment policies are established by the office in Janesville including policies relating to discipline. Initial decisions about discipline relating to timeliness are made in the corporate offices on the basis of records forwarded from each store. Those decisions are then transmitted to the local stores where the individual store managers exercise some wide degree of discretion in carrying out the suggested discipline or modifying or discarding it.

The Respondent uses, in general form, a policy of progressive discipline. First offenses usually receive an oral warning. A second offense brings a written warning which is also known as a policy reminder. Further violations of policy result in first a 1 DLO (one day disciplinary layoff), then a 3 DLO (three day disciplinary layoff) and finally termination. Once any of these levels is proposed by the corporate office, the local store manager may reduce, increase or vacate the discipline based upon his knowledge of the situation. Occasionally, a manager may seek guidance from Phil Woodman, the president of the Respondent, directly.

When deciding to deviate from the recommended level of discipline the manager generally looks at factors such as the seriousness and nature of the policy violation, the attitude of the employee, the employee's work or performance record, the employee's discipline record and the length of time since the last violation. When reviewing the employee's disciplinary record, a manager may disregard minor violations that occurred more than six months earlier. This so-called grace period changed from one year in 1991. Other common alterations may result from having a "clean" record for three months (reduction of discipline by one step) or two months (repetition of the step). Some of these changes were recommended by Dave Wagner, the manager at Store 16 to keep employees from reaching the termination level too quickly.

Discipline is usually initiated by the corporate office on the basis of time and other attendance records sent to the office from the individual stores. The individual store managers may initiate discipline where the violation is one of particularly local consequence such as a fight involving an employee or a theft attributable to an employee. When initiated by the corporate office, the manager receives a Management Employee Meeting Record (MEMR) from the Janesville office. The MEMR contains a description of the violation, the level of discipline called for by the schedule of discipline and the level of discipline required for the next offense. Accompanying the MEMR will be the employee's personnel record for the present year and where appropriate, that for the prior year. After the manager decides upon the level of discipline that he will issue, either he will speak with the employee or delegate that responsibility to the employee's direct supervisor. Dave Wagner's practice at Store 16 is too speak to the employee himself when the level of discipline has risen to a 3 DLO.

The Complainant began work at Store 16 in June of 1989. He began as a Utility Clerk and worked through the usual progression of levels to Department Clerk and eventually to Clerk. At the time of his termination on May 22, 1992, the Complainant was a Clerk in the Dairy Department on the third shift.

In general, the Complainant's performance record had been acceptable. This record is to be distinguished, however, from his attendance record. The evaluations performed at the beginning of the Complainant's employment and when he changed jobs indicate that the quality of his work was acceptable.

The Complainant first began to experience attendance problems several months after his initial employment. These problems included not coming to work, failing to call before coming to work late, not gaining prior approval for changes of lunch breaks, returning to work late after breaks, changing work schedules without prior approval and coming to work late. This pattern of policy violation continued through and came to a head during the spring of 1992. The period between the commencement of problems and the Complainant's ultimate termination demonstrates a continuing pattern of similar attendance difficulties.

In the Spring of 1990, the Complainant was being disciplined for his attendance problems. It was discovered at this time that the Complainant suffered from a sleep disorder that was having an adverse effect upon his ability to meet the Respondent's expectations with respect to attendance. Once this disorder was discovered, the discipline that had been levied against the Complainant was vacated and a temporary accommodation of the Complainant's condition was implemented. It was agreed that the Complainant would be allowed to vary from his assigned work hours by being late without fear of discipline. After a short period of time, the Complainant notified Wagner that he would no longer need the accommodation of his sleep disorder. During the period in which the accommodation was effective, the Complainant did not report to work late.

The Complainant's attendance problems began again during late 1990 and continued into the Spring of 1991. By April and May of 1991, the Complainant's attendance problems reached a level that could no longer be ignored. Wagner authorized the termination of the Complainant's employment. Wagner, before authorizing the Complainant's termination, took pains to assure himself that the Complainant's problems were not related to the sleep disorder experienced by the Complainant the preceding year.

The Complainant grieved Wagner's decision. After discussions with the Union representing the Complainant, Wagner and Phil Woodman decided to reinstate the Complainant to his position. A condition of the reinstatement was that the Complainant was to maintain a clean attendance record for the next three months.

Up to the point where Wagner authorized the Complainant's termination, the Complainant would have periods of improved attendance interspersed with problems. It was these periods of improvement that kept the Complainant from being terminated earlier.

After the Complainant's reinstatement, the Complainant began to experience attendance problems again almost immediately. The Respondent either excused these violations or gave the Complainant a second chance. The problems continued through the end of 1991 and into the beginning of 1992.

During this period the disciplinary record of the Complainant continued to mount. The Respondent's frustration with the Complainant's attendance problems culminated in a Management Meeting held on April 6, 1992. Similar meetings were held on the same day relating to employees Dave Betts and

Anthony Lewis. Betts and Lewis are White. The results of all three Management Meetings were the same. The employees were retained but warned to maintain a clean record for at least sixty days.

Neither Betts nor the Complainant were able to maintain clean records and quickly had further attendance violations. The violations of both Betts and the Complainant were excused by the Respondent and they were given an additional chance and warning. Lewis did not have an attendance problem but in July of 1992 suffered an injury that kept him from work and resulted in his demotion.

Subsequent to the initial attendance problems of Betts and the Complainant, the Complainant almost immediately had another attendance violation. Betts maintained a clean record until October of 1992. The Complainant was terminated on May 22, 1992 as a result of his second violation of the sixty day clean record period coming out of the April 6 Management Meeting. Lewis was not terminated until October of 1992 as a result of his failure to return to employment after the expiration of work restrictions stemming from his injury.

It is the treatment received by the Complainant, Betts and Lewis that forms the basis of the Complainant's claim. It is his contention that both Betts and Lewis were similarly situated to himself and as white employees received more favorable treatment than did he. It is the Respondent's position that the Complainant was neither similarly situated to Betts and Lewis and that even if he was, he was not treated differently from Betts and Lewis on the basis of his race under these circumstances.

The Commission uses the analytical framework for deciding discrimination cases set forth in McDonnell-Douglas Corporation v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), Rose v. Kippcast, MEOC Case No. 20851 (Ex. Dec. September 29, 1989). Under this paradigm, the Complainant must first make a prima facie showing of discrimination. If the Complainant meets these burdens of going forward and of proof, then the burden shifts to the Respondent. What shifts is the burden of production not necessarily of proof. The Respondent must be able to state a legitimate nondiscriminatory reason for its actions. If the Respondent meets this burden of articulation, the Complainant may still prevail if he can demonstrate that the reason proffered by the Respondent is either not credible or represents a pretext for other discriminatory motives. Demonstration that the Respondent has lied is not by itself sufficient to prevail. Saint Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 125 L. Ed.2d 407 (1993), The Complainant must demonstrate that discrimination motivated the Respondent. Saint Mary's Honor Center, supra.

In this case, the elements of the Complainant's prima facie case are:

1. Is the Complainant a member of a protected group and the Respondent subject to regulation?
2. Was the Complainant qualified for his position?
3. Was the Complainant treated differently from other employees not of his protected class?
4. Was the difference in treatment attributable to the Complainant's protected class?

As indicated above, there is no question that the Complainant is a member of a protected class and entitled to the protections of the ordinance. He is self-described as a mulatto. As persons of mixed races, mulattos are historically seen as separate from whites despite their often obvious background. Equally, the Respondent is clearly subject to the requirements of the ordinance. It is an employer that does business within the geographic limits of the City of Madison.

Somewhat more in dispute is whether the Complainant was qualified for his position. The Respondent argues that the Complainant's long history of attendance problems and attendant discipline made him

not qualified. This argument is disingenuous. Except for his difficulty conforming his personal schedule to the legitimate requirements of his employer, the Complainant appears to have been a good employee. This is reflected in the evaluations that were written at the times prescribed by the Respondent's practice. The only real discipline issued to the Complainant was as a result of his attendance problems. He performed his job reasonably well and sought to meet the Respondent's expectations of his work. He reported instances where he believed that other employees had violated the Respondent's policies either by engaging in harassing conduct or by stealing the Respondent's property. The Hearing Examiner can only conclude that the Complainant was qualified for his job and was capable of doing his assigned work.

The statement of the next element is in dispute by the parties. The Complainant is of the opinion that all he has to demonstrate is that White employees of the Respondent were treated differently than he was. The Respondent contends that this element requires that the employees who are being compared are similarly situated. The Hearing Examiner agrees with the Respondent in its formulation. In comparing treatment of employees, it is essential that the circumstances of the employees be roughly equivalent for the comparison to be meaningful. It would not be appropriate, for example, to compare, in most circumstances, application of the attendance policy to the manager and to the Complainant. The requirements of the job and the expectations of the Respondent may legitimately be different for different types or levels of employees. Equally, even for employees with identical job duties, the circumstances of their employment may be significantly different. If the Complainant has more or less seniority than that of the employees to whom he is being compared, the policy may require a different treatment. Similarly, an employee's discipline history could make a significant difference in how employees are treated. Race is not the only factor that must be considered.

The first difference between the Complainant and the other two employees is the relative length of service. The Complainant had been employed at least twice as long as either Betts or Lewis. During this longer time of employment, the Complainant had accumulated a greater number of MEMRs about his attendance, had numerous times approached the brink of termination and was in fact terminated in 1991 as a result of his attendance problems. The Complainant had a longer time to demonstrate to the Respondent that he could and would improve and failed to take advantage of that longer period of employment.

The next difference reflects the activity of the Complainant, Betts and Lewis after the April 6, 1992 Management Meetings. All three employees were summoned to attend these meetings. The meetings were held individually but one after another. Each individual employee had the opportunity to be represented by the Union at the meeting. Each employee was called to the meeting because of their problems with attendance. Each employee was told that he must keep a clean record for a period of sixty days or face termination. As a result of these meetings, each employee must have reasonably understood that his prior conduct was unacceptable and that continuing that course of conduct could have a drastic effect on his employment with the Respondent.

During the first thirty days of the sixty day clean record period, both Betts and the Complainant received MEMRs for attendance related reasons. Betts received one dated on or about May 4, 1992 and the Complainant received one dated on or about May 6, 1992. Lewis did not receive any MEMR during this period. Both Betts and the Complainant were reprieved from the recommended termination but were firmly warned that a further violation within sixty days would result in termination.

The Complainant, a short three weeks later, once again was the recipient of a MEMR on or about May 21, 1992, this time for tardiness and returning to work late after breaks. Consistent with the additional warning from Wagner earlier that month, the Complainant was terminated on May 22, 1992.

On the other hand, Betts who had received the same last chance warning as the Complainant in early May had no additional attendance problems or MEMRs until October of 1992. Wagner testified that Betts had seemed to take the warning to heart and markedly improved his performance. In other words, Betts did not have a second violation of the April 6, 1992 warning within the sixty day period and did not violate the terms of the last chance warning issued in early May of 1992.

Given these facts, Betts and the Complainant were not similarly situated at the time of the Complainant's termination. The Complainant's violation of the last chance warning came only three weeks after its issuance, well within the sixty day period prescribed by Wagner. Betts had not violated the last chance warning at the time of the Complainant's termination and did not have another attendance problem for almost another six months. Betts and the Complainant's circumstances in May of 1992 were not sufficiently similar to demonstrate that the Complainant was the victim of discrimination.

The circumstances of Lewis and the Complainant were entirely dissimilar subsequent to April 6, 1992. Lewis received no MEMRs during the sixty day period subsequent to the Management Meetings held on April 6. The first trouble experienced by Lewis resulted from an injury in July of 1992. This injury kept Lewis from being able to perform the functions of his job. As a result of this decrease in performance, Lewis was demoted. He next had two or three absences that were excused apparently because of their connection to his injury. Lewis was eventually placed on some sort of a disability related layoff. At the end of that layoff, Lewis failed to report back to work. After several days of Lewis's continued absence past the end of his restrictions, the Respondent terminated his employment, considering Lewis to have voluntarily quit.

Lewis's employment problems subsequent to the April 6 Management Meeting occurred outside of the sixty day clean record period specified in the warning. These problems were engendered by an injury that hindered his performance, not by violations of the Respondent's policies. The Complainant violated the requirements of the warning issued on April 6 twice before the expiration of the sixty day clean record period. The second of these violations occurred within twenty two days of the issuing of a last chance warning that included a requirement to keep his record clean for sixty days. Neither of the Complainant's violations resulted from an injury that affected his ability to perform the duties of his job. The Complainant was injured shortly before his termination but made no claim that the injury affected his ability to meet the requirements of the attendance policy. The circumstances of the Complainant and Lewis are simply not comparable.

There was passing testimony about the attendance record of another employee, Dennis Anderson. Anderson reportedly told the Complainant, that his (Anderson's) attendance record was much worse than the Complainant's and he had not been terminated. Anderson is White. The record does not contain sufficient information to judge the accuracy of this assertion. The Complainant admitted that he had no specific knowledge of Anderson's record and that Anderson had no such knowledge of his. This sketchy anecdotal evidence is insufficient, even with the other allegations contained in this record, to find that the Complainant was the victim of discrimination on the basis of his race.

The Complainant has failed to establish a prima facie case of employment discrimination based upon his race. His proof falls short because he is unable to establish that he was treated less favorably than other similarly situated employees. Even if the Complainant's position is correct and it is not

necessary to demonstrate that the Complainant was treated less favorably than other similarly situated employees, the Complainant would still lose under the McDonnell-Douglas/Burdine paradigm.

If the Hearing Examiner assumes arguendo that the Complainant has successfully made out a prima facie case of discrimination, he must examine the record to see if the Respondent has articulated a legitimate nondiscriminatory reason for its treatment of the Complainant. This is only a burden of articulation at this stage not one of proof. Burdine, supra. In this case, the Respondent has met its burden.

The Respondent states that the Complainant was terminated because of his long pattern of attendance violations and the Complainant's inability or unwillingness to conform to the Respondent's legitimate request for punctuality in its employees. A requirement that timeliness be observed is a legitimate exercise of the Respondent's authority to manage its work force. Sue Adams, the Complainant's Union representative, testified at hearing that the Respondent had the authority under its collective bargaining agreement to establish and enforce the attendance policy. She also testified that the Respondent exercised its authority strictly and apparently without regard to the race or other characteristics of its employees.

In order to prevail at this stage, the Complainant must now demonstrate that the Respondent's proffered reason is either not credible or is a pretext for other actually discriminatory reasons. The Complainant is unable to establish that the Respondent's proffered reason is not credible. Sue Adams testified that the Complainant would not have been likely to prevail if he had challenged his termination and sought arbitration. She believed that the Respondent had good cause to terminate the Complainant's employment. Equally she testified that she was aware of other employees, some of whom were White, who were treated less favorably than the Complainant with respect to termination for attendance problems. Adams clearly has no axe to grind with either side and her testimony in general supports the position of the Respondent. Given this support, there is no reason for the Hearing Examiner to conclude that the Respondent is not credible with respect to the assertion of the reason for the Complainant's termination.

In an effort to demonstrate that the Respondent was actually motivated by discriminatory motives in his termination, the Complainant points to several instances of alleged discrimination against him during his employment. These incidents do not support a finding that the Respondent was more likely motivated by a discriminatory motive than a legitimate business reason in terminating the Complainant's employment.

The Complainant asserts that Wagner ignored the Complainant's complaint that another worker called him a racially inflammatory name. During this incident, the Complainant stated that the co-worker called him a "nigger" while he was walking past her pushing a large, noisy cart. The testimony is clear that Wagner quickly spoke with the persons. involved and determined that the incident had not occurred. Wagner knew the employee who the Complainant accused and believed her when she said that she would not and did not call the Complainant a name like that. She testified at hearing and despite aggressive questioning by the Complainant's counsel, the record contains no information that leads the Hearing Examiner to doubt her testimony to the Commission or to Wagner. Simply because the Complainant is unsatisfied or disappointed with the results does not mean that Wagner did not act responsibly in investigating the Complainant's complaint.

Similarly, the Complainant points to two incidents where his involvement in a fight or altercation resulted in some investigation though no discipline. The first incident involved a fight off the Respondent's premises between the Complainant and another employee of the Respondent. Wagner

testified that normally such an incident would not be a matter of interest to the Respondent. However, this incident involved special facts that affected the Respondent's interests. The fight resulted in an injury to the other employee that affected his ability to work. Additionally, the employee asked Wagner to fire the Complainant because the employee stated that he feared the Complainant. After investigating the incident, Wagner determined that the Complainant should not be disciplined and eventually terminated the employment of the other employee as a result of information uncovered during the investigation.

The second altercation occurred on the premises of the Respondent. Investigation revealed that rather than a fight, the incident was really a shoving match between two employees. Both were warned. Significantly, the other employee in this incident was African American.

In both of these cases the Respondent had a legitimate interest in conducting an investigation of the facts. There is nothing in the record to indicate that the Complainant was targeted for special attention in these incidents. In the first, the Complainant was entirely exonerated while a White employee eventually was terminated. In the second incident, the Complainant was not disciplined but was treated in the same manner as the other employee. The Respondent has a legitimate interest in seeing that all of its employees are free from threats of violence connected with the workplace. Under the circumstances of these cases, the record indicates that the Respondent was merely exercising its authority in a reasonable manner.

The Complainant also contended that he had been denied a reward through the Respondent's whistle blower program, despite reporting the theft of a can of soda pop by another employee. The Respondent testified that the Complainant did not receive the reward because of an error in procedure on its part. The reward program applies only to cases where an employee is convicted of theft. In this particular case, the employee was confronted with his theft before leaving the premises. Since he did not leave the premises with unpaid for merchandise, the Respondent was unable to proceed with a prosecution. While it may have been in the best interests of the Respondent to have paid the reward in this circumstance to reward a vigilant employee, its failure to recognize the employee's contribution does not appear to have been racially motivated.

The Complainant also asserts that at one time in his employment. he was assigned to more difficult or onerous tasks than those not of his race. Specifically, he indicated that he had to stock more aisles of merchandise than other employees not of his race and that he was required to pick up empty boxes.

Testimony at hearing clearly established that the number of aisles to be stocked was not a true indicator of the level of work required by an employee. In any one aisle, an employee may have to stock the whole aisle or some significantly smaller portion depending upon the contents of the aisle and whether suppliers stocked their own merchandise. To this end, the Complainant's counsel took a long period of time attempting to establish that the Complainant had to stock more than other employees. The Complainant's counsel was bemused at the end of this testimony because it was clear that the Complainant had actually been assigned less shelf space to stock than other employees. Besides, the testimony of Rod Kellerhuis, the Complainant's third shift supervisor, clearly demonstrated that the aisle assignments were only a way of getting the employees situated so that the whole store could be restocked and the aisles cleared of empty boxes during the less busy third shift. Employees are always expected to assist other employees with stocking once they have completed their initial assignment. The Complainant confirmed that he had helped other employees and grudgingly admitted that he may have received help from other employees occasionally. All employees including supervisors and other managers from time to time assist in removing empty boxes from the aisles. Empty boxes represent a hindrance to the job of stocking and a safety threat to

anyone in the store. While the Complainant may not like picking up empty boxes, it is clear that everyone must from time to time perform this task regardless of their race or position.

Finally the Complainant asserts that he was transferred from a position in the warehouse because of his race. He asserts that he was doing his job well and that therefore his race must have been the reason for his transfer. The Complainant's supervisor at the warehouse, Jerry Kratochwill, testified that the Complainant had not in fact been performing his job well. Kratochwill testified to the specific problems that the Complainant had and demonstrated how those problems adversely affected the warehouse operation. There is nothing in the record to suggest that the Complainant's race was a factor in his transfer from the warehouse.

None of the examples of allegedly racist incidents demonstrate that the Respondent might have had an illegally discriminatory motive in terminating the Complainant's employment. The Respondent has been able to establish that either the Complainant misunderstood the circumstances of the incident or that he was treated at least equally to, if not better than, other participants. The Complainant, even if he had made out a prima facie case of discrimination, would not prevail because he did not show that the reasons proffered by the Respondent for his termination were not worthy of credence or were otherwise a pretext for other discriminatory motives.

The Hearing Examiner believes that the Complainant is a decent and honorably motivated person. He, unfortunately, has had trouble conforming to the legitimate requirements of the Respondent. This difficulty may in some part be caused by the Respondent's establishment and enforcement of an attendance policy that can have an unduly harsh effect on some employees. Efforts on the part of management to mitigate the harshness of the policy may have caused the Complainant not to appreciate the severity of his conduct. The Complainant at hearing testified that he disagreed with the Respondent's policy and how it is enforced. 'While the Complainant's feelings are understandable, his violation of the policy established by his employer represent a legitimate nondiscriminatory reason for his termination. The Complainant has regained his job separate from this action. The Hearing Examiner hopes that the Complainant will be able to meet the Respondent's expectations.

As indicated above, while discrimination does not appear to have motivated the Respondent in this matter, the Respondent is hardly faultless for the perceptions that its system may be used to harbor discriminatory motives. While it is unquestionably the right of the Respondent to establish and enforce any nondiscriminatory attendance policy that it wants, any system that creates bright line standards that both employees and managers feel are too strict and require softening will engender mistrust and a lack of respect for that system. The current system, even with the modifications suggested by Wagner, appears to be such a system. Employees are "written up" for even minor infractions and managers-have to intercede in a nonstructured manner with the use of their own discretion to overcome the harshness of the circumstance. It would probably be better to utilize a system that does not create such an initially high standard and at the same time reduce the discretion that can be exercised by managers later in the discipline process. The current system gives little incentive to an employee to conform his conduct until it is almost too late. It seems to create a game of chicken where the employee does not realize that he or she has reached the end of the rope because each time the end appeared earlier, it was extended.

The Hearing Examiner is also troubled by the testimony to the effect that Mr. Woodman would not reinstate the Complainant if he filed a grievance through the Union but would if the Complainant filed a complaint with the Commission. If true, such an attitude belittles the role of the Union and the Commission and represents an unjustifiably cynical attitude about the importance of laws and processes adopted to protect the equal opportunities of persons protected by these laws. The Hearing

Examiner hopes that the testimony reflecting this attitude rnischaracterized the true feelings of the Respondent's owners and management.

Subject to the rights of review set forth in the ordinance and the Rules of the Commission, this complaint is dismissed.

Signed and dated this 4th day of August, 1994.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell III
Hearing Examiner