

**EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
351 WEST WILSON STREET
MADISON, WISCONSIN**

<p>CHARLES T. DAVIS</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>ALPINE RENTALS</p> <p style="text-align: center;">Respondent</p>	<p>FINDINGS AND ORDER OF EQUAL OPPORTUNITIES COMMISSION</p> <p>Case No. 2473</p>
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The Examiner issued Recommended Findings of Fact, Conclusions of Law and Order on April 24, 1980. Timely exceptions were filed, and an appeal hearing was held before the Commission on June 27, 1980.

Based upon a review of the record in its entirety the Equal Opportunities Commission issues the following:

ORDER

That the attached Recommended Findings of Fact, Conclusions of Law and Order are adopted in their entirety and shall stand as the final Findings of Fact, Conclusions of Law and Order herein and the Complaint is hereby dismissed in its entirety.

OPINION

This case presented two major issues:

1. Was the Complainant, a black, actually performing the same work as a white employee who was not terminated?
2. Is seniority to be measured from the date of hire of an individual or from the date the individual actually starts work?

In this case, we do not reach the second issue because we can resolve the matter on the basis of the first.

Complainant Davis, a black, was hired to do "contract cleaning" by Respondent. A white employee, Radecki, was hired to do "maintenance" by the Respondent. From the record, it appears that the job descriptions for "maintenance" and "contract cleaning" are different. The Respondent, Mr. Joseph Fallina, says so and his testimony goes unrefuted. The question of what job duties Davis and Radecki actually performed is undeveloped.

Therefore, using a "substantial evidence" standard, the Commission determines that the first sentence of Finding of Fact #12, "At the point Complainant was laid off, he was the contract cleaning employee with the shortest length of service with Respondent," was supported by substantial evidence. Because the testimony as to actual jobs performed is undeveloped, it was reasonable to infer that Davis and Radecki actually performed different jobs, and that Davis' discharge was justified because he was in fact the contract cleaning employee with least seniority.

Signed this 16th day of July, 1980 at Madison, Wisconsin.

Roberta Gassman,
President

J. C. Wright
Executive Director

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Hearing in this matter was scheduled for January 15, 1980 and upon notice was held on that date. Subsequently, Respondent moved to reopen the hearing. That motion was granted March 24, 1980. And on March 24, respondent entered its defense.

Appearances: Complainant appeared in person and by David Weber of the Legal Clinic, Inc.

Respondent appeared in person and by Daniel Sandell.

Having viewed all exhibits and heard all witnesses and observed their demeanor, the examiner makes the following:

RECOMMENDED FINDINGS OF FACT

1. Complainant, Charles Thomas Davis a/k/a Charles Powers is a member of the Black race.
2. Respondent, Alpine Rentals, operates an apartment management business with offices in Madison, Wisconsin. The manager of the business was Joseph R. Galliano. Alpine also operated a business which contracted with builders of apartment complexes to clean the complexes and install appliances as construction of the complexes was completed.
3. Complainant was hired by respondent to begin work in the early part of April, 1978. He was to do janitorial work in the contract cleaning service.
4. His rate of pay was \$3.55 per hour.
5. At the time of Complainant's employment, Respondent's employment practices were lax. It had no written application for employment, nor did it keep records of the addresses of employees, save tax records which were in the control of its accountants.
6. On April 28, 1978, Complainant entered St. Mary's Hospital in Madison and was treated for a staff infection which resulted at least in part from an injury received while at work. He remained in the hospital about one week.

7. Complainant called Respondent on the Monday after he entered the hospital. He also asked his wife to call Respondent.
8. Mr. Joseph Galliano instructed Complainant to report to work after he was discharged from the hospital. Complainant did so approximately two days after his discharge. He remained at home for those two days on his doctor's instructions.
9. When Mr. Davis returned to work, Mr. Galliano informed him that there was not sufficient work for him at that time. And, that he was laid off.
10. By the beginning of May, 1978, Respondent's contracts for cleaning apartment complexes greatly decreased. Consequently, Respondent reduced the size of his work force in that operation.
11. Between May and September, 1978, Respondent laid off all his contract cleaning employees, including the foreman of the contract cleaning operation.
12. At the point Complainant was laid off, he was the contract cleaning employee with the shortest length of service with Respondent. Complainant contacted Respondent later in May, 1978 to get his final pay check. Aside from that, Complainant did not maintain contact with Respondent after he received his last paycheck in late May, 1978. During the period from May to the beginning of October, 1978, Complainant made diligent efforts to seek other employment. In October, 1978, Complainant became a student at Madison Area Technical College and was no longer available for employment.
13. No persons were hired to do contract cleaning until November, 1978, when John Stalworth, a Black, was hired for similar work.
14. Owing to Respondent's lack of employee recordkeeping, it did not know how to contact Complainant after his lay off.
15. The only new employees hired by Respondent between the time Complainant was laid off and the time he became unavailable for employment were temporary employees hired by the manager of the Pepper Tree Apartment complex to do maintenance on apartments being vacated and reoccupied at Pepper Tree Apartments. These individuals were not hired by Mr. Galliano or Alpine's central office. Two other individuals were hired in Appleton, Wisconsin to do maintenance work on apartments that Respondent managed in Appleton.

RECOMMENDED CONCLUSIONS OF LAW

1. Respondent laid off Complainant as part of a general lay off of all his contract cleaning employees.
2. Such a lay off constitutes a legitimate business purpose for the action taken against the Complainant.
3. The evidence of the record as a whole does not support a finding that the lay off was in fact a pretext for illegal discrimination.

RECOMMENDED ORDER

This case is hereby ordered dismissed.

Dated at Madison, Wisconsin this 24th day of April, 1980.

Robert L. Greene
Hearing Examiner

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Respondent failed to appear at hearing in this matter on January 15, 1980. Pursuant to Madison Equal Opportunities Commission Rule 9.4, the hearing proceeded. That rule provides that if Respondent fails to appear within one-half hour of the scheduled time for hearing, and if the Complainant can present a prima facie case that a violation of Madison General Ordinance 3.23 has occurred, an order will be issued for Complainant.

On January 21, Respondent moved to have the case reopened to allow them to present a defense. Such a motion is controlled by Wisconsin Statutes s806.07 which replaced Wisconsin Statute 269.46 and for all relevant purposes is identical to it.

The Wisconsin Supreme Court has construed the rule's requirement of mistake, inadvertence, surprise or excusable neglect and it has held that "The primary question is whether the conduct of the moving party was excusable under the circumstances." Hansher v. Kaishian 79 Wis. 2d 374, 255 N.W. 2d 564 at 573 (1977).

Respondents did appear at the pre-hearing conference in this case.

The affidavit of Joseph L. Gallina submitted in support of the motion indicates Mr. Gallina was likely out of town when the Notice of the January 15 hearing was received in the mail and was misfiled by someone other than Mr. Gallina. The implication is that one of Mr. Gallina's employees was unaware of the importance of the Notice, and thus consigned it to a place where Mr. Gallina would not be likely to look for it or find it. Given that circumstance, Respondent can reasonably be excused from attending a hearing which he did not know about. Thus, it would be inequitable to refuse to allow Respondent to assert a defense.

Case is ordered reopened.

Dated at Madison, Wisconsin this 24th day of March, 1980.

Robert L. Greene, Esq.
Hearing Examiner