EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MONONA AVENUE
MADISON, WISCONSIN

Michael Stanton c/o Attorney Dan Linehan 114 North Carroll Street Madison, WI 53703 Complainant vs. Diary Equipment Company 1919 South Stoughton Road Madison, WI 53716 Respondent	RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 2540

A complaint of discrimination was filed on November 29, 1979 with the Madison Equal Opportunities Commission (MEOC) alleging discrimination on the basis of race and handicap in regard to employment. Said complaint was investigated by Human Relations Investigator Renee Payne (then Renee Caldwell) and an Initial Determination dated November 12, 1980 was issued finding probable cause to believe that discrimination had occurred as alleged.

Conciliation was waived or unsuccessful and the case was certified to public hearing. A hearing was held on October 28, 1981. Attorney Daniel W. Linehan of LINEHAN LAW OFFICES represented the Complainant who also appeared in person. Attorney Dennis M. White of MELLI, SHIELS, WALKER AND PEASE, S.C. represented the Respondent who also appeared by employee-representatives John Drydyk and Steven Lane.

Based upon a review of the record and after consideration of the post-hearing briefs, the Examiner proposes the following RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER:

RECOMMENDED FINDINGS OF FACT

1. The Complainant, Michael Stanton, is an adult, black male.

2. The Respondent, Dairy Equipment Company, is a corporation doing business and employing persons in the City of Madison, State of Wisconsin.

3. The Complainant began employment with the Respondent as a welder on August 1, 1977.

4. In 1977, the Complainant injured his back and visited a doctor from that time on complaining of recurring back pain.

5. On August 29, 1979, the Complainant fell at work and again injured his back. He did not work for the Respondent again between August 29, 1979 and the date of his discharge on September 29, 1979.

6. The Respondent's plant rules include the following rules:

> Rule 27 - If an employee is unable to report for or perform work due to illness or other justifiable cause, he must report his expected absence and give the reasons for his inability to work to his Foreman or other Company Representative as may be designated from time to time.
>
> (Part of Preface to Rule 13) - An employee who fails to maintain proper standards of conduct at all times or who violates any of the following rules shall subject himself to disciplinary action, including discharge:
>
> 13. Unauthorized or unexcused absence or lateness.

7. Article XV and Article X of the collective bargaining agreement in effect at the time of the Complainant's discharge and to which the Complainant was subject as a member of Local 565 of the Sheet Metal Workers International Association read as follows:

ARTICLE XV

DISCIPLINE AND TERMINATION

(Par.) 213 Section 15.01. An employee's seniority will be terminated under the following conditions:

(Par.) 216 Section 15.01(c). If he is absent for three (3) consecutive working days without notifying the company unless a satisfactory reason is given in writing.

(Par.) 217 Section 15.01(d). If he fails to report for work at the end of a leave of absence, unless he can furnish proof of his inability to report.

ARTICLE X

SENIORITY

(Par.) 170 Section 10.08. The Company shall grant a leave of absence under the following terms arid conditions:

(Par.) 171 A medical leave of absence will be approved for an employee upon presentation to the Company of a written statement by a qualified physician giving the reason for such request and the physician's recommendation as to the length of time the employee should be absent from work; however, the Company reserves the right to require that an employee be examined by a medical doctor selected by the Company, at Company expense, before granting a medical leave of absence.

Medical leaves of absence shall be granted to employees to the extent of their illness or injury not to exceed six (6) months. Extensions shall be granted in three (3) month increments upon receipt of a written statement by a qualified physician. Employers placed on medical leaves of absence will have such leaves confirmed in writing by the Company.

8. The Complainant was sent to the doctor by the Respondent after injuring his back at work on August 29, 1979. The Complainant returned that day with a medical slip stating that it was "indefinite when he could return to work". The Complainant was told by Steven Lane, the Complainant's supervisor, that Lane needed more specifics on when the Complainant could return to work. Lane sent the Complainant home with a blank medical slip to take to his (the Complainant's) doctor, and Lane said he would call the Complainant the next day to tell him when he was to see the doctor again.

9. Lane called the Complainant on August 30, 1979 and told him that Stanton should see a doctor on September 4, 1979, that he should have the doctor fill in a date on the blank medical slip indicating when the Complainant could return to work, and that he should return the slip to the Respondent. Lane then went on vacation from August 31, 1979 to September 10, 1979 but upon his (Lane's) return went to work on a different shift than he and the Complainant had been working.

10. The Complainant visited a Dr. Rudy on September 4, 1979, but did not present a medical slip to the Respondent regarding that visit.

11. The Complainant visited a Dr. Patterson on each of the following dates:

a) September 12, 1979
b) September 27, 1979
c) October 12, 1979

12. Subsequent to the September 12, 1979 visit to Dr. Patterson, the Complainant returned to the Respondent a medical slip signed by Dr. Patterson stating that:

Michael should not work 9/12 - 9/22. Low back pain.

13. After September 12, 1979, the Complainant did not again contact the Respondent until October 12, 1979. In the meantime, the Complainant was discharged on September 28, 1979. The reason given by the Respondent for the termination was that the Complainant had been absent for more than three consecutive days without notifying the Respondent (See Respondent's Exhibit 15).

14. The October 12, 1979 visit to Dr. Patterson was subsequent to the Complainant's discharge and was made after the Complainant had filed for unemployment compensation and was told to see his doctor to obtain a medical slip.

15. At the October 12, 1979 visit, the Complainant obtained a medical slip from Dr. Patterson indicating that he could return to work as of October 1, 1979.

16. On October 12, 1979, the Complainant filed a union grievance to which he attached said medical slip of the same date. This was the first time the company had been notified of the Complainant's medical condition since September 12, 1979.

17. On a previous occasion in 1977, the Complainant also had been absent for three consecutive days without notifying the Respondent. However, the Respondent permitted the Complainant to return to work due to mitigating circumstances.

RECOMMENDED CONCLUSIONS OF LAW

1. The Complainant is a member of the protected classes of race and handicap within the meaning of Section 3.23, Madison General Ordinances.

2. The Respondent is an employer within the meaning of Section 3.23, Madison General Ordinances.

3. The Complainant was not discriminated against on the basis of race by the Respondent within the meaning of Section 3.23, Madison General Ordinances.

4. The Complainant was not discriminated against on the basis of handicap by the Respondent within the meaning of Section 3.23, Madison General Ordinances.

RECOMMENDED ORDER

That this case be and hereby is dismissed.

MEMORANDUM OPINION

I. RACE DISCRIMINATION

The Complainant presented only the barest of evidence regarding the race discrimination issue, primarily limited to the fact that the Complainant is black and some statistics regarding the Respondent's workforce. The Complainant's evidence was insufficient to establish even a *prima facie* case of discrimination under a disparate treatment theory (and accordingly, was also insufficient to establish a disparate impact case of discrimination).

Also, the Respondent, in 1977, had discharged and later reinstated the Complainant under similar (though not identical) circumstances, a fact refuting the Complainant's arguments that whites were treated differently, at least as to the three-day absence without notice rule.

II. HANDICAP ISSUE

The Complainant was handicapped within the meaning of the ordinance at a minimum by virtue of his medical history of which the Respondent was aware (See Footnote below).[1]

The key issue in this case is whether or not the Respondent's articulated reason for the Complainant's discharge, that the Complainant (1) failed to call in for three consecutive days to inform the Respondent of his absence and (2) failed to provide an adequate reason(s) for not calling in, was pretextual of handicap discrimination.

The evidence shows that the Complainant was physically able to call the Respondent and the Complainant had in the past been made aware of his responsibility to keep the Respondent informed of the duration of his absence. His discharge for failure to keep the Respondent informed of his anticipated return date does not constitute handicap

discrimination under these circumstances, particularly where there is no persuasive showing that exceptions were made for non handicapped employees.[2]

Using a Flowers v. Crouch Walker model, the Complainant failed to carry his burden of proof to show by a preponderance of the evidence that the Respondent's articulated reason for the discharge was a pretext for handicap discrimination.

Signed and dated this 9th day of June, 1982.

EQUAL OPPORTUNITIES COMMISSION

Allen T. Lawent
Hearing Examiner

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1. A handicapped individual has been defined try this agency in previous eases as follows:

A handicapped individual is . . . any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such impairment, or (C) is regarded as having such impairment.

This definition was acknowledged by the Wisconsin Supreme Court in Dairy Equipment Company v. DILHR, 290 N.W. 2d 330, 22 EPD 30,809 and was borrowed from the federal definition found in 29 U.S.C., sec 706(b), 1976 as appended to the Rehabilitation Act of 1973. While Dairy Equipment construed the Wisconsin Fair Employment Act (Sec. 111.31, et seq, Wis. Stats.), I have previously ruled the definition to be applicable to Section 3.23, Madison General Ordinances in view of the Ordinance's language similarity with the State Act and the fact that they both lacked a definition of handicap.

However, the recent revision to the State Act, Chapter 334 of the Laws of 1981 (SB 204), published May 6, 1982, and presumably effective on May 7, 1982, defines a handicapped individual as an individual who:

(a) Has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work;
(b) has a record of such impairment; or
(c) Is perceived as having such impairment.

Notwithstanding whether the Dairy Equipment definition or the recently legislated definition is applied to the Ordinance, and notwithstanding the absence of expert medical testimony, I find that the evidence presented by the Complainant was adequate to carry his burden that he was handicapped within the meaning of the Ordinance in that:

(1) The Respondent was aware that the Complainant had received and was receiving treatment for a back injury; and
(2) The injury was such that it limited the Complainant's capacity to work and/or established that the Complainant had a record of such impairment (of which the employer was aware).

2. Under a Boynton Cab v. DILHR, 25 EPD 30,925 (1980) analysis, the Complainant proved that he was handicapped within the meaning of tire ordinance but failed to prove that he was discharged because of his handicap (i.e., that there was a causal connection between his handicap - whether actual, recorded, or perceived - and his discharge). Under a Flowers v. Crouch-Walker, 552 F.2d 1277, prima facie case model (essentially a form of McDonnel-Douglas v. Green) even presuming that the Complainant was successful in establishing a prima facie case of handicap discrimination, the Complainant accordingly did not persuade by a preponderance of the evidence that the Respondent's articulated reason for discharge was pretextual of handicap discrimination from (applying Texas Department of Community Affairs v. Burdine, 101 S. Ct. 1084).

The key issue is whether or not the Respondent's failure to confirm in writing the Complainant's medical leave constituted handicap discrimination. While it is unclear in this case whether the Respondent's failure to confirm in writing the Complainant's medical leave constituted a violation of Article X of the collective bargaining agreement with Local 565 (see Finding of Fact 7), adherence to or violation of the collective bargaining agreement is not at issue except insofar as it may be probative of the employer's motivation in discharging the employee (in determining whether or not the motivation was discriminatory). Just as adherence to a collective bargaining agreement will not necessarily shield an employer from liability for discrimination, deviation from a collective bargaining agreement will not necessarily establish that discrimination had occurred.

In this case, the company's policy was not to confirm leaves of absence in writing until after an employee had been off work more than two weeks, notwithstanding the provisions of Article X of the collective bargaining agreement, and it is clear that the Complainant was off work for more tan two weeks.

Even if Respondent's actions in failing to confirm the Complainant's medical leave of absence in writing violated the collective bargaining agreement, it was not discriminatory for the Respondent to discharge the Complainant where the evidence shows that the Complainant did not contact the Respondent after submitting the doctor's excuse on September 12, 1979 authorizing his absence through September 22, 1979. The Complainant's failure to keep the Respondent updated on his medical status, in light of evidence that he was aware of his obligation to do so and that he was physically able to do so, precludes a finding in the Complainant's favor where a phone call to the Respondent would have been adequate and where the Respondent did not discharge the Complainant until three working days of absence without notification had elapsed beyond the date of absence (September 22, 1979) authorized by the last known medical excuse (although the Complainant later obtained a retroactive medical excuse).