

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

Brooks Robinson 202 North Pinckney Street Madison, Wisconsin 53703 <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> Electronic Data Systems Corporation One West Main Street Madison, Wisconsin 53703 <p style="text-align: center;">Respondent</p>	RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 2559
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A complaint was filed in the above entitled matter on February 1, 1980, with the Madison Equal Opportunities Commission (MEOC) alleging race discrimination in regard to employment.

Said complaint was investigated by MEOC Human Relations Investigator, Renee Caldwell. An Initial Determination dated May 7, 1980 was issued finding Probable Cause to believe that discrimination had occurred.

Conciliation was waived and/or unsuccessful, and the case was certified to public hearing. A hearing was held on November 11, 1980. The Complainant appeared in person. The Respondent appeared by its employee-representative, Gordon Lee. The Examiner proposes the following Recommended Findings of Fact, Conclusions of Law and Order:

RECOMMENDED FINDINGS OF FACT

1. The Complainant, Brooks Robinson, is an adult, Black male residing in the City of Madison.
2. The Respondent, Electronic Data Systems Corporation, is a corporation doing business in the City of Madison.
3. Robinson was hired as a data entry operator by Respondent and he began employment on February 7, 1979. He worked from 6:00 p.m. to midnight, and rarely, if ever, worked past midnight; as a data entry operator.
4. Robinson was a good employee throughout the duration of his employment with Respondent.
5. In May of 1979, Robinson applied for a position as a "Back up Supervisor Trainee" with Respondent. The only other candidate for the position (a third candidate withdrew from the consideration for the position) was a White female, Jody Halverson, who was also employed by Respondent as a Data Entry Operator.
6. Respondent evaluated Robinson and Halverson for the position using the following comparative data:

	Robinson	Halverson
Production Rate	46.88 Equalized Documents/Hr.	71:08 Equalized Documents/Hr.
Error Rate	1.75%	.38%
Job Knowledge	53%	100%
Knowledge of Equipment Functions	Entry	Entry & Verification
Knowledge of Work Schedule	Vague	Complete

7. Respondent weighted each job for difficulty to arrive at the "Equalized Documents" measurement.
8. Respondent's policy was to promote the person with the highest achievement, regardless of supervisory experience to positions such as "Back-up Supervisor Trainee." Both Robinson and Halverson were qualified for the position.
9. Robinson had approximately 2-1/2 years of supervisory-type experience: about 14 months as a Human Services Director at a neighborhood center and about 5 months as a Director's Assistant at a radio station.
10. Halverson had no supervisory experience prior to her promotion to "Back-up Supervisor Trainee."
11. Robinson was not paid overtime for working more than 30 hours per week, but would have been entitled to overtime had he worked more than 40 hours in a given week.
12. Wisconsin law requires that overtime be paid after 40 hours per week.
13. Respondent employed two Blacks out of approximately 32 employees, including the Complainant.
14. Robinson was asked to transfer to the Balancing Division from the Data Entry Division around November 1979. He was told that his Data Entry position would likely be phased out and that he would improve his chances of maintaining a job with Respondent if he accepted the transfer. Complainant did accept the transfer.
15. Robinson's scheduled hours in the Balancing Division were 7:00 p.m. to 1:00 a.m. However, when he reported on time the first evening he had transferred, he was informed that during the holiday season schedule, he was to begin at 7:30 p.m. He also learned that he had to stay "until the work was done." Three White employees in the Balancing Division worked on the same working schedule as Complainant and, like Complainant, had to work until 2:30 a.m. or later on a semi-regular basis; i.e., until the work was done.
16. After his transfer to the Balancing Division, Robinson performed both data entry and balancing work, and was the only employee to extensively perform both duties.
17. Robinson's immediate Balancing Division supervisor, Rebecca, terminated her employment in January of 1980. She was not replaced.
18. In order to supplement his income, Complainant took a job at radio station WWQM that began at 2:00 a.m. Respondent had a policy that employees were not to take other jobs which would create a conflict of interest with their employment for Respondent. Complainant had previously worked for another radio station and for the

Wisconsin Department of Local Affairs and Development. Robinson's division supervisor, Lesley Older, was aware of Complainant's other previous employment but did not object.

19. On Friday, January 18, 1980, Robinson worked for both Respondent and WWQM with no difficulties arising. Robinson had discussed with supervisory personnel his desire to be assured that he could leave by 1:30 a.m. each evening in order to arrive at the WWQM job on time.

20. Robinson took a paid vacation from his Balancing Division job from January 21 to January 25, 1980. He worked at WWQM during this period.

21. Upon his return to work on January 25, 1980, Complainant was presented with an ultimatum by Respondent's supervisory personnel to the effect that he either make a commitment to remain until the work was done, even if beyond 1:30 a.m., or be terminated.

22. Complainant refused to make a commitment to remain until the work was done, preferring instead to wait to see if an actual schedule conflict developed before making a choice. Respondent, therefore, terminated him and asked him to leave. Complainant refused to leave unless he received a written termination notice. After several phone calls to various company executives, Respondent's supervisory personnel provided Complainant with a written statement regarding his termination and Complainant left the premises.

23. It was Respondent's policy not to provide written reprimands nor to provide written termination letters.

24. Robinson almost always would come in early to work when asked.

25. Robinson supported a family.

26. Had Robinson remained in the Data Entry Division, his job would have been phased out.

RECOMMENDED CONCLUSIONS OF LAW

1. Complainant is a member of a protected class, race, within the meaning of Section 3.23, Madison General Ordinances.

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

3. Respondent did not discriminate against Complainant on the basis of race in regard to termination of employment in violation of Section 3.23, Madison General Ordinances.

4. Respondent did not discriminate against Complainant on the basis of race in regard to terms and conditions of employment or in any other manner regarding employment in violation of Section 3.23, Madison General Ordinances,

RECOMMENDED ORDER

That this case be and hereby is DISMISSED.

MEMORANDUM OPINION

Complainant alleges five instances of conduct on the part of Respondent that he believed were racially discriminatory:

- a. failure to promote him to a position as "Back-up Supervisor Trainee" in the Data Entry Division to which a White female was appointed
- b. failure to pay him overtime for hours worked in excess of 30 in a week but less than 40
- c. failure to announce a supervisory position in the Balancing Division and appointing a White female to that position.
- d. terminating Complainant because he had taken an outside job that began one-half hour after the scheduled end of Complainant's shift and would not verbally commit himself to staying "until the work was done" even if the work lasted past the scheduled end of his shift
- e. He was not paid for the last 3 days of his employment with Respondent.

The Examiner finds all of these allegations without merit.

As the charging party, the Complainant must carry the burden of proof by a preponderance of the evidence.¹ The Complainant fails to do so on each issue.

I. PROMOTION IN THE DATA ENTRY DIVISION

The two primary candidates for the position of "Back-up Supervisor Trainee" were Complainant, a Black male, and Jody Halverson, a White female. Accepting Complainant's testimony that he was told by Data Entry Division head, Lesley Older, that his mere four months' experience would not be a barrier, the Examiner finds that Complainant was at least minimally qualified for the job and established a prima facie case of discrimination. Respondent must then articulate some legitimate non-discriminatory reason(s) for not promoting Complainant and did articulate the following:

Halverson produced more "Equalized Documents" per hour, had a lower error ratio, had more job knowledge, had more knowledge of equipment functions and had a greater knowledge of work schedules than Complainant (see Recommended Finding of Fact 6).

Even accepting that the latter three factors were insignificant and subjective (job knowledge, knowledge of equipment functions, and knowledge of work schedules), Complainant still fails to meet his burden. It was Respondent's policy to promote the person with highest achievement to supervisory positions, notwithstanding whether the person had past supervisory experience. The factors of "Equalized Document" production (ED/HR) and error ratio are predominantly objective factors. Halverson had a significantly higher ED/HR ratio than Complainant (71.08 to 46.88) and had a significantly lower error ratio than Complainant (0.38% to 1.75%). Further, the evidence shows that Halverson performed more aptly on identical tasks (see Respondent's Exhibit 12).

It is up to Complainant to show that Respondent's neutral and objective policy had a disparate impact on Blacks. Or the Complainant could have shown that the policy was somehow pretextual because the policy was not uniformly applied and because there was some past discriminatory conduct which might infer a racially discriminatory motive in failing to promote Complainant. Complainant fails to show either discriminatory impact or discriminatory intent (there were no instances of disparate treatment of Complainant prior to the time of the promotional opening).

Complainant's argument that his supervisory experience was not taken into account is accurate. However, Complainant has failed to show that it was discriminatory not to do so.

II. FAILURE TO PAY OVERTIME

Complainant was hired to work 30 hours per week as a data entry operator. When he transferred to the Balancing Division, he frequently worked more than 30 hours per week, as did at least 3 White employees who worked with him. Wisconsin law requires that overtime be paid only after 40 hours per week (or eight hours per day). Complainant did not show that he was treated differently than Whites nor that Respondent did anything illegal in regard to overtime pay.

III. FAILURE TO ANNOUNCE SUPERVISORY POSITION IN BALANCING DIVISION

After Complainant transferred to the Balancing Division, Complainant's supervisor, Rebecca, left Respondent's employ. Complainant believed she was replaced by a Lesley Mahnke because another employee had told him so. While Complainant's testimony is hearsay, Respondent's testimony was that Rebecca was not replaced, by Mahnke or anyone else and that Mahnke's functions were otherwise. Considering also that Complainant worked with Mahnke and was uncertain of her supervisory function, the Examiner finds in favor of Respondent on this point.

IV. COMPLAINANT'S TERMINATION

What is clear is that Complainant was a good employee, was willing to work additional hours, and was flexible in the duties he was willing to perform. The problem that led to his termination began with his transfer to the Balancing Division. In the Data Entry Division, his hours were generally 6:00 p.m. to midnight without exception. When he transferred to the Balancing Division; his hours were scheduled for 7:00 p.m. to 1:00 a.m. but were altered to 7:30 p.m. to 1:30 a.m. Further, he, like three White employees, was required to stay "until the work was done." This required him to stay on a semi-regular basis to 2:30 a.m. or later. He had previously held two part-time jobs at different times outside his work with Respondent. Lesley Older, head of both Data Entry and of Balancing, knew of his outside employment and did not object.

Respondent did have a policy prohibiting employees from the holding of outside jobs that created a conflict of interest. Clearly, Complainant's new job that he took at WWQM radio station was not a conflict of interest because of its subject matter. The problem here was the hours. Complainant worked one day, January 18, 1980 at both jobs. His shift with EDS ended at 1:30 a.m., and he was able to make it to the radio station on time where his shift ran from 2:00 a.m. to 6:00 a.m. Complainant then took a week of paid vacation, and returned to EDS on January 28, 1980. Upon his return, EDS wanted him to make a verbal commitment that he would stay "until the work was done" if that were necessary. Complainant had previously asked EDS to accommodate him by assuring him that he could leave at 1:30 a.m. so he could arrive at the radio station on time. Consequently, Complainant would not commit himself one way or the other as to whether or not he would stay "until the work was done."

Complainant argues that Respondent should not have terminated him until an actual conflict arose. The issue at hand is whether the termination was discriminatory. Three other White employees were expected to stay "until the work was done." Respondent's decision to terminate Complainant was due to its concern with whether or not he would be available to do the work but had nothing to do with his race. Perhaps the Respondent acted too hastily in discharging Complainant, but that is a labor law matter and not an employment discrimination matter in the absence of a showing of racial motivation.

V. LOST PAY

Complainant attempts to show that Respondent failed to pay him for the last three days of his employ; presumably the last two days of vacation and the night Complainant was terminated. Complainant failed to present sufficient evidence to establish this allegation. Therefore, I do not need to reach the issue of discriminatory motive in regard to this charge. Complainant, of course, may pursue this matter with the appropriate state agency governing labor standards to recover any amounts due, if in fact there are any.

In summary, Complainant was a good employee who encountered some work situations that were possibly unfair but by no means discriminatory. I recommend that this case be dismissed.

Signed and dated this 7th day of January, 1981.

Allen T. Lawent
Hearing Examiner

¹See Board of Trustees v. Sweeney, 439 U.S. 24, 18 F.E.P. 320.