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

William Hargons 3529 Lexington Avenue Madison, WI 53714 Complainant vs. Gardner Baking Company 3401 East Washington Avenue Madison, WI 53704 Respondent	NOTICE OF RIGHT TO APPEAL FINAL ORDER Case No. 2619

Attached is the Final Order of the Madison Equal Opportunities Commission (MEOC). If discrimination was found, the Respondent must comply with the Order or the Commission may seek judicial enforcement of the Order as prescribed by Section 3.23(9)(c)3., Madison General Ordinances and/or Respondent may be subject to the penalty described in Section 3.23(12), Madison General Ordinances. If no discrimination was found, the allegations have been dismissed. A Final Order may find discrimination regarding some allegations and no discrimination regarding other allegations.

Either or both parties may seek judicial review of the attached Final Order as provided by Section 68.13 of the Wisconsin Statutes, by common law or by any other available legal remedy.

Signed and dated this 9th day of November, 1981.

EQUAL OPPORTUNITIES COMMISSION

A. Gridley Hall
President

J. C. Wright
Executive Director

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

William Hargons 3529 Lexington Avenue Madison, WI 53714 Complainant vs. Gardner Baking Company 3401 East Washington Avenue Madison, WI 53704 Respondent	FINAL ORDER Case No. 2619

The Hearing Examiner of the Madison Equal Opportunities Commission (MEOC) issued the Recommended Findings of Fact, Conclusions of Law and Order on April 29, 1981. Timely exceptions were filed, written arguments were submitted, and oral arguments were heard by the Commission (nine Commissioners were present).

Based upon a review of the record in its entirety, the MEOC issues the following:

ORDER

(A) That Recommended Conclusion of Law #3 shall be deleted and the following substituted therefor:

> "3. The Respondent did not discriminate against the Complainant on the basis of race in violation of Sec. 3.23, Madison General Ordinances."

"That this case be and hereby is DISMISSED."

(C) That the Examiner's Opinion shall be deleted.

(D) That the Recommended Findings of Fact, Conclusions of Law and Order subject to the above modifications (in A, B, and C) shall stand as the FINAL ORDER herein.

Five of the nine Commissioners--Commissioners Amato, Abramson, Galanter, Thome and Ware--all join in entering the FINAL ORDER as recited above. Said Final Order reverses the Examiner's conclusion that discrimination had occurred and said FINAL ORDER results in an order dismissing this case. Commissioners Goldstein and Mendez dissented. Commissioner Conrad was absent from the voting session and did not vote. Commissioner Hall chaired the voting session and did not exercise his prerogative to vote.

OPINION

Based on the facts presented, the majority of five Commissioners disagreed with Examiner that the Complainant had carried his burden of proof as required by Texas Department of Community Affairs v. Burdine.[1] As the evidence indicates that this fight was the first fight at the company and that both employees (black and white) were discharged, the majority finds that the Company rule against fighting on company property as an activity that "could lead to dismissal" was a legitimate, non-discriminatory reason for discharging the Complainant. Neither fighter was questioned by the Respondent and both were dismissed. Consequently, the majority does not find that the Complainant has established that the reason for the discharge was either pretextual or unworthy of credibility (see Burdine, supra).

Signed and dated this 9th day of November, 1981.

EQUAL OPPORTUNITIES COMMISSION

A. Gridley Hall
President

[1] 25 EPD par. 31,544 (1981)

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

William Hargons 3529 Lexington Avenue Madison, WI 53714 Complainant vs.	RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER Case No. 2619

Gardner Baking Company 3401 East Washington Avenue Madison, WI 53704 Respondent	

A complaint of discrimination was filed in the above-entitled matter on April 29, 1980 with the Madison Equal Opportunities Commission. Said complaint alleged discrimination on the basis of race in regard to employment. Following an investigation by MEOC Human Relations Investigator Mary Pierce, an Initial Determination dated August 11, 1980 was issued. Said Initial Determination found Probable Cause that discrimination had occurred in regard to the termination of Complainant's employment and No Probable Cause that discrimination had occurred in regard to the terms and conditions of Complainant's employment.

Conciliation was waived or unsuccessful, and the matter for which Probable Cause was found was certified to hearing.

A hearing was held on January 20, 1981. Attorney Jeff Scott Olson appeared on behalf of the Complainant who also appeared in person. Attorney Paul Hahn of Boardman, Suhr, Curry and Field represented the Respondent whose employee-representative was Howard Spilde. The Examiner proposes the following Recommended Findings of Fact, Conclusions of Law and Order:

RECOMMENDED FINDINGS OF FACT

1. Complainant is a black adult residing in the United States of Wisconsin.

2. Respondent is an employer engaged in the manufacture of baked goods with a production facility located in the City of Madison.

3. On March 28, 1980, the Complainant was involved in a physical altercation with a white employee, Ron Luchowski. Subsequent to the altercation, both employees were asked to leave work and both were terminated without again returning to work for the employer.

4. Between the time they were asked to leave work and the time they were actually terminated by the employer, neither the Complainant nor Luchowski were questioned by the Respondent regarding their versions of the altercation. Respondent did interview other witnesses prior to actually terminating both employees. The witnesses interviewed by the Respondent were Ron Caucutt, James Trausch and Janette Auby.

5. Respondent had a written policy that fighting on company property could lead to dismissal. Said policy was contained in a book entitled "Policies-Rules-Regulations" that was distributed to its employees including the Complainant.

6. The following events occurred leading up to the physical altercation:

> Complainant and Luchowski were working on the bread production line. In order to avoid a potential jam on the line, Luchowski shut off the line. Shutting off the line triggered a buzzer that attracted the attention of supervisor Ron Caucutt. Caucutt came over to where Luchowski was working and began yelling at him. Luchowski, after Caucutt had finished yelling, then commenced to yell at the Complainant and continued to do so as Luchowski and the Complainant proceeded to clear up the production line problems. Complainant responded to Luchowski's yelling with some heated words of his own. At one point, Complainant ascended some steps leading to a platform above the production line. The platform was approximately four feet off the ground. Luchowski followed the Complainant up the steps. Caucutt was about twelve feet away operating an electrical control panel.

7. While the Complainant was partially seated on the platform, Luchowski struck a blow that knocked the Complainant's "bump cap" off of his head. Luchowski was standing two steps below where the Complainant was located on the platform at the time Luchowski struck Complainant's bump cap. Subsequent to the Complainant's bump cap being knocked off, Complainant and Luchowski immediately engaged in a struggle that lasted no more than 15 seconds. During the course of the struggle, Caucutt yelled at the two men to stop fighting. Caucutt, however, could not leave the electrical panel to try and stop the fight as Caucutt would have been discharged for leaving the electrical panel because such action would have resulted in the ruination of $6,000 of bread.

8. The struggle between Luchowski and Complainant was broken up by corporate executive James Trausch who had run to the scene after observing the struggle from an office 20 feet away. At the time Trausch arrived at the scene, Complainant had subdued Luchowski in a headlock. Trausch sent both the Complainant and Luchowski home after breaking up the struggle, and termination of both employees followed as described in Findings of Fact 3 and 4 above.

9. The Complainant acted in self-defense in attempting to subdue Luchowski after Luchowski had struck him on the head.

10. Luchowski had a reputation of being a "hothead" with a quick temper.

11. Neither Complainant nor Luchowski had a history of physical fighting.

12. Complainant had been employed by Respondent since March 5, 1978.

RECOMMENDED CONCLUSIONS OF LAW

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

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

3. Respondent discriminated against Complainant on the basis of race in violation of Sec. 3.23, Madison General Ordinances by terminating him for fighting on company property where he had acted in self-defense.

RECOMMENDED ORDER

1. That the Respondent shall cease and desist discriminating against the Complainant in regard to race in violation of Sec. 3.23, Madison General Ordinances.

2. That the Respondent shall pay to the Complainant backpay from March 28, 1980 to the date this order becomes final with the following restrictions:

a. That the amount of backpay the Complainant is entitled to shall be reduced by amounts that the Complainant has earned or could have earned with reasonable diligence.

b. That amounts received by the Complainant as unemployment benefits or welfare payments shall not reduce the back-pay allowable, but shall be withheld from the Complainant and immediately paid to the unemployment reserve fund or, in the case of a welfare payment, the welfare agency making such payment.

c. That the Complainant shall receive no more than $2,500 (Two Thousand Five Hundred Dollars) in excess of any and all amounts required to be paid to the agencies referred to in b. above.

3. That the Respondent shall not be required to reinstate the Complainant.

OPINION

This case raises two main issues:

1. Did the Complainant, a black employee, act in self-defense in a fight on March 28, 1980 with a white co-employee on Respondent's property (during working hours)?

2. If it is found that the Complainant did act in self-defense, did the Respondent unlawfully discriminate against the Complainant by terminating him where the white co-employee was also terminated pursuant to a company policy that fighting on company property could lead to dismissal?

The self-defense issue turns on the credibility of the witnesses. Complainant was the only witness who testified in his behalf. All other witnesses who testified in his behalf. All other witnesses were called by the Respondent. The ultimate burden of persuading the trier of fact that the defendant (Respondent) intentionally discriminated against the plaintiff (Complainant) remains at all times with the plaintiff (Complainant). See Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 18 EPD par. 8673. The Complainant must prove by a preponderance of the evidence a prima facie case of disparate treatment. See Texas Department of Community Affairs v. Burdine, 25 EPD par. 31,544. The prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained,

are more likely than not based on the consideration of impermissible factors." See Furnco v. Waters, 438 U.S. 567, 577, 17 EPD par. 8401 and Burdine, supra. The burden then shifts to the Respondent to rebut the presumption of discrimination (the prima facie case) by producing evidence that the Complainant was terminated for a legitimate nondiscriminatory reason. The Respondent need not persuade the Examiner that it was actually motivated by the prooffered reasons. See Sweeney, supra, at 25. It is sufficient if the Respondent's evidence raises a genuine issue of fact as to whether it discriminated against the Complainant. See Burdine, supra. The Complainant retains the burden of persuasion and must now show that a discriminatory reason more likely motivated the employer than the employer's articulated non-discriminatory reason or the Complainant must show that the employer's prooffered reason is unworthy of credence. See Burdine, supra.

Using the above allocation of the burden of proof, I was initially persuaded that the Complainant had acted in self-defense and therefore established a prima facie case of discrimination. out of five witnesses, a majority corroborate of the following facts:

1. That the Complainant was on the top of a platform when Luchowski knocked his hat off while standing below. (Corroborated by Complainant, Luchowski, Trausch and Auby)

2. The Complainant and Luchowski ascended the platform from the same side with the Complainant ascending first followed by Luchowski. (Corroborated by Trausch, Caucutt and Auby) (Luchowski said they ascended from opposite sides and the Complainant did not directly testify on this matter.)

3. Luchowski struck Complainant's "bump cap" and no blows were struck prior to this by either Luchowski or Complainant. (Corroborated by Complainant, Luchowski, Trausch and Auby) (The witnesses are evenly divided, two to two, as to whether Complainant and Luchowski were facing each other or whether Luchowski struck Complainant from behind.) (Caucutt is the only witness who claims punches were being thrown on the ground prior to the two ascending the platform.)

4. The "fight" was very brief in duration, lasting no more than 15 seconds from the time Hargons was struck on the cap to the time Trausch broke up the fight. (Corroborated by Complainant, Luchowski and Trausch, and essentially corroborated by Auby) (Auby describes the fight sequence from the time of Luchowski's blow to the breaking up by Trausch, but she estimates one to two minutes as its duration -- I find this to be an erroneous exaggeration of the duration on her part.)

5. Hargons had subdued Luchowski in a headlock when Trausch arrived on the scene. (Corroborated by Complainant, Luchowski, Auby, Trausch, and Caucutt)

A verbal argument preceded the physical portion of the altercation, and such argument was clearly provoked by Luchowski according to Complainant's and Luchowski's testimony. Complainant and Luchowski were the only two witnesses privy to the verbal argument.

Complainant has therefore shown by a preponderance of the evidence that Luchowski, a white co-employee, provided a verbal argument and later initiated a physical confrontation by striking Complainant from below while Complainant was on top of a platform, and Luchowski has followed Complainaint up the platform in order to strike the blow. To defend himself after his "bump cap" had been knocked off by Luchowski's blow, the Complainant engaged in a brief struggle with Luchowski and subdued him in a headlock, the entire duration of the struggle lasting no more than 15 seconds.

I ultimately conclude that the Complainant acted in self-defense in this matter, and by virtue of showing that he acted in self-defense established a prima facie case of discrimination where both he and Luchowski (the protagonist) were both terminated after the fight. Where the Complainant, a black, received the same disciplinary treatment for defending his bodily safety as a white employee who endangered the Complainant's bodily safety, I find the Complainant has met the initial burden of showing disparate treatment by the employer. And as there is no contention that the Complainant had not otherwise been performing his job satisfactorily, I find the Complainant successfully shifted the burden to Respondent to articulate a legitimate, nondiscriminatory reason for Complainant's termination.

Respondent relies on its policy against fighting on company property. By articulating this alleged legitimate, nondiscriminatory reason for Complainant's termination, the burden of persuasion shifted back to the Complainant. The Complainant did not show that the employer was more likely motivated by a discriminatory reason than the prooffered nondiscriminatory one in that the Complainant presented no other evidence of disparate treatment of the Complainant or other blacks by the employer. However, I am persuaded that the employer's prooffered reason is unworthy of credence.

The policy that Respondent relies upon appears in its booklet for production personnel entitled "Policies - Rules - Regulations." The policy states that "The Following Violations Could Lead to Dismissal" and goes on to enumerate conduct including, but no limited to, gambling and cardplaying on company property, horseplay, scuffling, intentional destruction or defacing company property or products, smoking in prohibited areas, and so on. Acting in self-defense is not listed specifically, however, there also is a listing of fighting on company property as a violation that could lead to dismissal. As the enumerations on this list generally appear to proscribe intentional conduct, the proscription against fighting on company property must be read in that same light. Acting in self-defense against a human attacker is no different than acting in self-defense against a falling steel beam. The primary focus is on protecting one's safety against an unexpected, unprovoked danger. And clearly self-protection against danger was not contemplated by the Respondent's list of violations that "could lead to dismissal." If the word "could" is to have any meaning at all, the Respondent's policy cannot be read to include self-defense as a form of fighting that could lead to dismissal absent other circumstances (such as verbal or physical provocation by the person later alleging s/he acted in self-defense).

In support of its position of reliance on company policy against fighting, the Respondent has cited two cases which must be distinguished here. In Sharpe v. R. L. Ziegler Co., 11 FEP 1140, a black supervisor was discharged following a fight with a white employee. As in this case, the white employee was also discharged. But in Sharpe, the black supervisor was found to have contributed to the instigation of the fight by physical as well as verbal action, and the black supervisor renewed the fight after the two employees were separated. Further, two of the three employees who had been previously dismissed for violating the no-fighting rule were white (indicating that the no-fighting rule had not been disparately enforced). In our case, there is no finding that the Complainant contributed to the instigation of the fight, nor is there evidence to indicate that the Complainant had attempted to renew the fight after he and Luchowski had been separated.

The case of Johnson v. Packing Corp. of America, 23 FEP 126 (1980) is more on point. Decided in the U.S. District Court of Colorado, the court stated:

> Although the testimony might support a finding that the plaintiff's discharge, based as it was on a fight he did not start, was mistaken or even unfair, there is absolutely no evidence that it was related to the plaintiff's race.
>
> No evidence whatever supports the plaintiff's contention that he was treated differently from any other employee involved in a fight while at work for the defendant. The only fight of any kind as to which there was competent evidence, was the one which led to the plaintiff's discharge, and that fight resulted in the firing of both employees involved, one white and one black.

The Johnson case is virtually identical to the case at hand. The only fight for which competent evidence was introduced was the fight which the Complainant was involved in. The testimony supports a finding that the Complainant did not start the fight, and both a black employee (the Complainant) and a white employee were discharged. No further evidence of disparate treatment of blacks by the Respondent was introduced, and certainly no disparate impact argument can be made. However, in Johnson, the court specifically notes that "the plaintiff does not seem to contend that the fight in which he was involved did not fall within the type of conduct prohibited by the company's no-fighting rule." And that is exactly the issue I have considered in this case and found in the Complainant's favor: Acting in self-defense did not fall within the type of conduct prohibited by Respondent's no-fighting rule.

In conclusion, I find that the Complainant has carried his burden of persuasion by showing that he acted in self-defense and consequently establishing a prima facie case of race discrimination, and further showing that the Respondent's articulated reason for discharging him was not a credible reason. As a result, I have entered appropriate conclusions and orders.

Signed and dated this 29th day of April, 1981.

Allen T. Lawent
Hearing Examiner

William Hargons 3529 Lexington Avenue Madison, WI 53714 Complainant vs. Gardner Baking Company 3401 East Washington Avenue Madison, WI 53704 Respondent	EXAMINER'S ORDER FROM COMPLAINANT'S MOTION TO PERMIT INTRODUCTION OF THE RESULTS OF A POLYGRAPH EXAMINATION Case No. 2619

Pursuant to Complainant's prehearing motion and after consideration of the respective written arguments by the parties, the Examiner makes the following ORDER regarding Complainant's motion to have the Examiner determine in advance of hearing whether or not the results of a polygraph examination will be per se inadmissible:

It is hereby ORDERED that the results of any polygraph examination will be per se inadmissable unless there is a written stipulation signed by the parties including consent of the individual to be examined;

It is further ORDERED that even with the required stipulation and consent, the polygraph results will be admissible at the Examiner's discretion and cross-examination of the person(s) administering the polygraph examination will be allowed.

MEMORANDUM OPINION

While State v. Stanislawski, 62 Wis. 2d 730 recognized that advances had been made in the polygraph test field sufficient to overturn the 40-year ban that the Wisconsin Supreme Court had imposed on the admissibility of polygraph examination in criminal cases, the Court nevertheless imposed the stipulation restriction as a requisite. Said stipulation restriction is the "majority rule" while admissibility of un-stipulated exams is the "minority" rule in courts around the United States. See Lhost v. State, 85 Wis. 2d 620 (1979).

The Lhost court thought it too soon to abandon the Stanislawski stipulation rule, and discussed the issue of reliability as an important factor in its refusal to abandon the rule. The Lhost court indicated that where a "friendly" polygraph test administer is used, absent a stipulation the credibility of the test results are more likely to be suspect. This is because the test subject realizes that any negative results may not be introduced as evidence and the subject's "fear of detection" is greatly reduced.[1]

While an administrative forum can be less rigid regarding the admission of relevant evidence than a criminal forum where jail sentences are at stake and a higher standard of due process has traditionally and constitutionally been required, the administrative forum should not be less rigid in its search for the truth. As the Lhost court indicates on page 648 to 649 of its opinion, the use of the polygraph test as an investigative tool is to be encouraged but "The requirement that the stipulation be entered into before the test is given insures that the polygraph examination is to be used as a tool in searching out the truth, not as a device for potentially confusing the jury." This Examiner shares the Lhost court's apprehensions regarding the use of polygraph test and believes that without safeguards the test could confuse an Examiner as well as a jury. And in light of the policy against the use of polygraphs be employers that appears in Section 3.63 of the Madison General Ordinances and 111.326 Wis. Stats., the Examiner finds such concern is appropriate regarding employment matters as well as criminal matters and subscribes to the stipulation rule as a prerequisite to admissibility of a polygraph test.

Signed and dated this 22nd day of December, 1980.

Allen T. Lawent
Hearing Examiner

[1]The court refers on page 642 to a study by Dr. Martin Orne in his article, "Implications of Laboratory Research for Detection of Deception." 2 Polygraph 169 (1973)