

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

<p>Tracy Fitzgerald 2820 West Chambers Milwaukee, WI 53210</p> <p style="text-align: center;">Complainant</p> <p style="text-align: center;">vs.</p> <p>Hillhaven, Inc. d/b/a Colonial Manor Housing Home 105 South Stoughton Road Madison, WI 53714</p> <p style="text-align: center;">Respondent</p>	<p>NOTICE OF RIGHT TO APPEAL</p> <p>Case No. 2757</p>
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Attached are the Recommended Findings of Fact, Conclusions of Law, and Order of the Equal Opportunities Commission's Hearing Examiner. The Rules of the EOC provide for appeal of this decision in the following terms:

10.1 Either party may appeal the Recommended Findings of Fact, Conclusions of Law, and Order of the Commission's designee by filing written exceptions to such Findings, Conclusions, or Order in the EOC offices no later than ten (10) days after receipt of said Findings, except that where the tenth day falls on a Federal holiday or on a non-business day, the appeal will be accepted on the first business day thereafter.

10.2 If neither party appeals the Recommended Findings of Fact, Conclusions of Law, or Order within ten (10) days, they become final Findings, Conclusions and Order of the Commission. If an appeal is made to the Commission, it shall consider only the record of the hearing, written exceptions to the Recommended Findings, Conclusions and Order, any brief properly submitted before it, and oral arguments presented by the parties at a review hearing scheduled by the Commission. To be properly submitted, briefs by any party must be served upon opposing parties or their counsel and received by the Commission and served upon the opposing party at least ten (10) days prior to the scheduled review hearing. Any party requesting a written transcript of the proceeding shall pay the actual cost of preparing said transcript including copying costs. The Commission shall affirm, reverse or modify the Recommended Findings and Order. Any modification or reversal shall be accompanied by a statement of the facts and ultimate conclusions relied on in rejecting the recommendations of the Commission's designee. Such decision of the Commission shall be the final Findings of Fact, Conclusions of Law and Order of the Commission.

This Notice, Findings, Conclusions of Law, and Order have been sent to both parties by certified mail, with a dated receipt. Any appeal from these Findings, Conclusions and Order must be postmarked or delivered at the offices of the EOC within ten (10) days of the date of receipt.

Dated at Madison, Wisconsin this 18th of February, 1982.

Allen T. Lawent
Hearing Examiner
Enclosure
cc: Milton Donald, Advocate for Complainant
Andrew Harris, Assistant Employee Relations Manager

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A complaint was filed with the Madison Equal Opportunities Commission (MEOC) on January 23, 1981 alleging discrimination on the basis of race in regard to employment. Said complaint was investigated by MEOC Human Relations Investigator Renee Caldwell, and an Initial Determination dated May 29, 1981 was issued finding probable cause to believe that discrimination occurred as alleged.

Conciliation failed or was waived, and the case was certified to a public hearing. A hearing was held on November 17, 1981. The Complainant appeared in person and was assisted by lay advocate Milton E. Donald. The Respondent appeared by its corporate Assistant Employee Relations Manager Andrew L. Harris and by local employee Shirley Keller. Based upon the record of the hearing and after consideration of the posthearing briefs submitted by the parties, the Examiner proposes the following RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER:

RECOMMENDED FINDINGS OF FACT

1. The Complainant, Tracy Fitzgerald, is an adult, black male residing in the State of Wisconsin.
2. The Respondent, Hillhaven Corporation (d/b/a Colonial Manor Nursing Home), is a corporation operating a nursing home and employing people within the City of Madison.
3. The Complainant was hired by the Respondent on August 11, 1980. The Complainant worked as a Nurse's Aide while in the Respondent's employ. He worked the "first shift" (6:30 a.m. to 2:00 p.m. or thereabout).
4. Prior to his termination, the Complainant had received the following written warnings:
 - a. On September 2, 1980 for having been absent two consecutive days, August 30 and 31, and for having arrived at work late on September 2.
 - b. On October 10, 1980 for working slow, taking lunch at an unassigned time, a napping incident over his lunch time, and leaving prior to having made two beds.
 - c. On October 27, 1980 for absenteeism and job performance (specifically, not completing assignments).
 - d. On December 8, 1980 for tardinesses (nine over his last three pay periods).
6. The warning on December 8, 1980 resulted in Fitzgerald's being suspended for three days by the Respondent. The Complainant was also advised that the next warning he received would result in termination.
7. The Complainant's fifth written warning received on January 22, 1981 was for having missed work consecutively on January 17 and 18, 1981. He had called in sick on January 17 and did not call nor show up to work on January 18. While Fitzgerald had requested and been granted a funeral leave for

January 19 and 20, 1981, he was not on leave for January 17 and 18. The employer's policy was to grant up to three days of funeral leave, if requested.

8. Prior to his termination, the Complainant had been absent a total of 19 times for various reasons. He had been tardy at least nine times.
9. The Complainant's supervisors, in increasing order of authority, were as follows:
 - a. Phyllis Wakely
 - b. Evelyn Dedrick
 - c. Kathleen Thurber (his primary supervisor)
 - d. Shirley Keller, Personnel Administrator
 Wakely, Dedrick and Thurber each worked with the Complainant a substantially greater amount of time than did Keller.
10. The Respondent has employed the following persons as Nurses Aides and has taken the following personnel actions in respect to them:
 - a. Pam Christianson, a white female; voluntarily terminated after missing two consecutive days (with call) because of car trouble. She had missed 20 days for various reasons (including at least four without calling in) between her hire on November 10, 1980 and her termination on June 16, 1981. She was given provisional rehire consideration. She had received two warnings for absenteeism prior to her voluntary termination.
 - b. June Herring, a white female; was hired on May 2, 1980. She is still employed and was absent 30-plus times between May 2, 1980 and May 29, 1981. She was suspended for three days after her fifth warning, and advised that the next warning would result in termination. She had received two warnings for absenteeism, one for punching out early, and two related to job performance. Keller, the Administrator, wrote on her June, 1981 evaluation "Attendance and work performance must be improved if you want to continue your employment with us."
 - c. Ruth Knorr, a Native American; was absent 19 times for various reasons between the date of her hire on September 29, 1980 and the date of her second written warning on June 4, 1981. She was suspended for three days following the second warning and was advised that any future warning would result in her termination. She is still employed by the Respondent and has been absent at least six more times between June 4, 1981 and August 26, 1981.
 - d. Joanne Brill, a white female; was absent 40 plus times since her hire on August 11, 1980 to May 22, 1981. She had received one warning as of May 22, 1981 and was advised that any further warning may result in further action. On June 2, 1981 she received a second warning for a tardiness and a no call, no show absence. She was suspended for three days and advised that a further violation of company rules "may result in termination." She is still employed.
 - e. Dawn Bowes, a white female; was absent 38 times between the date of her hire on July 23, 1979 and the date of her voluntary termination on February 27, 1980. She was terminated with provisional rehire consideration.
11. Respondent's employees were considered absent if they were ill, if they called in for any other reason, or if they were "no call, no show".
12. A log kept by Supervisor Thurber titled "Personnel Conference Report" included entries that related to the Complainant's work performance. The last entry relating to unsatisfactory work performance was dated October 14, 1980. The only other subsequent entry in Thurber's log was dated November 28, 1980 and related to a tardiness.
13. The three month evaluation signed by Thurber and Keller indicates that the Complainant's job performance through December 18, 1980 was as follows:
 - a. Knowledge of Job - Has learned necessary routine, but needs supervision.
 - b. Accuracy of Work - Makes few errors; is careful, thorough and neat.
 - c. Work Accomplished - Works with ordinary speed; work is satisfactory.
 - d. Work Habits - Wastes time occasionally; is usually reliable.
 - e. Adaptability - Adjusts readily.

The Complainant's overall evaluation filled in by Wakely was as follows:

"Tracy gives good care to his patients. He needs to develop organization of his work assignment. He cooperates with other staff members. He accepts constructive criticism well and profits by it. He must learn to control his voice as it can become very loud."

The Complainant was given the following suggestions, filled in by Dedrick, regarding improving his performance:

- a. He should remember to chart items such as ROM;
- b. He should try to control his voice;
- c. He should be in uniform.

Thurber wrote the following regarding the Complainant: "Tardiness and absence due to illness are very real problems. Tracy has demonstrated admirable patience in dealing with difficult residents. However, I feel he needs supervision to keep his performance at good quality." Thurber also wrote that she discussed proper bowel care with the Complainant. Administrator Keller wrote in no comments on Fitzgerald's evaluation.

14. On June 4, 1981, Keller signed an evaluation for June Herring. Keller personally wrote on Herring's evaluation the following: "Attendance and work performance definitely must be improved if you want to continue your employment with us." (See also Findings of Fact 5b.) Dedrick wrote the following regarding Herring's work performance as part of her overall evaluation: ". . . she tends to hurry and this has caused personal injury at times . . ."
15. On May 22, 1981, Joanne Brill received a warning signed by Keller and Dedrick for having lied to the Respondent when Brill and Ruth Knorr left work supposedly having to take Brill to the hospital. Neither employee called in or returned that day.
16. The Complainant sought and was unable to find employment between the time of his termination in January of 1981 and approximately June of 1981. The Complainant is presently employed in a full time job.
17. Christianson would have been involuntarily terminated had she not failed to appear for work after her final absences.

RECOMMENDED CONCLUSIONS OF LAW

1. The Complainant is a member of the protected class of race 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 Respondent discriminated against the Complainant on the basis of race in regard to discharge from employment in violation of sec. 3.23, Madison General Ordinances.
4. The Complainant used due and reasonable diligence in seeking employment subsequent to his discharge by Respondent.

RECOMMENDED ORDER

1. That the Respondent cease and desist from discriminating against the Complainant on the basis of race.
2. That the Respondent pay to the Complainant the backpay that he would be entitled, less any ordinance setoffs, had he continued to be employed for two additional months beyond the date of his termination.
3. That the Respondent shall eliminate any reference to poor work performance as a reason for his termination, and that the Respondent shall regard his termination as voluntary and shall give him provisional rehire consideration. Any reference to poor job performance as a reason for termination shall also be removed from the Complainant's personnel file.
4. The Respondent shall, within thirty (30) days of the date this Order becomes final, submit to the Examiner evidence of compliance with Numbers 1 through 3 of this Order, including submission of a copy of the backpay check which shall have been remitted to the Complainant.
5. Within thirty (30) days of the date this order becomes final, the Respondent shall submit to the Equal Opportunities Commission a revised warning policy for absenteeism which shall base warnings for absenteeism and tardiness on their actual occurrence and numbers, regardless of when reported to the Personnel Administrator (Keller).

MEMORANDUM OPINION

While an employee who has been absent 19 times and tardy nine times in a little over a five month period has far from an exemplary record of attendance, an employer may not treat that employee disparately than other employees on the basis of his race. This is exactly what this Respondent has done.

The Respondent gives two primary reasons for the Complainant's involuntary termination:

- a. Poor attendance and punctuality.
- b. Poor work performance.

I. Work Performance was Not a Legitimate, Non-Discriminatory, Factor, but was a Pretext for a Racially Discriminatory Termination

As described at length in Findings of Fact 13, the Complainant received a rather flattering "three month" evaluation. The negative job performance aspects were as follows:

- a. He spoke in a loud voice.
- b. He should be in uniform.
- c. He should remember to chart items such as ROM.
- d. He needed to pay more attention to proper bowel care.
- e. He needed to organize his work assignments.
- f. He needed supervision to keep his performance at good quality.

However, overall it was said that he gave patients good care, handled difficult patients well, cooperated with other staff members, and accepted constructive criticism well.

Administrator Keller wrote no comments on the Complainant's evaluation which she signed on December 18, 1980, a month prior to Fitzgerald's termination.

Yet, Administrator Keller saw fit to write the following comments on a June 4, 1981 evaluation for June Herring, a white employee:

"Attendance and work performance definitely must be improved if you want to continue your employment with us:

Dedrick wrote that Herring's tendency to hurry had caused personal injury at times. Herring continues to be employed by the Respondent.

Despite Fitzgerald's deficiencies, one must conclude from the overall evaluation that his work was at a minimum satisfactory and at least as satisfactory as Herring's work which had resulted in personal injury and prompted a written remark from Keller regarding performance.

II. Attendance and Punctuality Were Also Pretexts for Race Discrimination, as the Complainant was Treated Disparately From Other White and Non-Black Employees

The Complainant was absent 19 times and tardy at least nine times between the start of his employment on August 11, 1980 and his involuntary termination on January 22, 1980.

Following are the attendance and tardiness records of two white females:

- a. Dawn Bowes - 38 absences between July 23, 1979 and February 27, 1980. Voluntary termination, provisional rehire consideration.
- b. Joanne Brill - 41-plus absences and at least one tardiness between August 11, 1980 and June 2, 1981. She is still employed.

It is first important to understand the Respondent's absenteeism and warning policies.

A. Absenteeism

The Respondent fairly strictly enforced its absenteeism policy that required termination of an employee who had three consecutive absences. The Complainant, however, is not alleged to have violated this rule.

B. Warnings

Written warnings were issued by Keller when she became aware of problems with employees. As her direct contact in observing the performance and attendance of Nurse's Aides was far less than the other supervisors, Keller usually relied on the supervisors to report problems that could warrant a written warning.

Keller applied the following procedures regarding warnings for absenteeism:²

a. A situation which warranted a written warning for absenteeism (not all absences warranted a written warning) that was reported to Keller within a day of the occurrence usually resulted in a written warning being issued by Keller.

b. A situation which warranted a written warning for absenteeism but which was not reported until 7 or more days had elapsed since its occurrence would not result in a written warning being issued by Keller.

c. A situation which warranted a written warning for absenteeism but was not reported until two to six days had elapsed since its occurrence might or might not result in a written warning being issued by Keller. The earlier the report, the more likely a written warning would be issued (one factor was how many days the offending employee had worked between the violation and the reporting of the violation to Keller).

Consequently, if supervisors chose not to report situations to Keller for a period of time, if at all, some employees might not receive written warnings for conduct for which other employees did.

Further, Keller generally required that at least three written warnings be issued prior to terminating an employee (except for such conduct as a violation of the three consecutive day absence policy which resulted in immediate termination). However, the number of written warnings received by employees prior to termination varied.

The result of the Respondent's policies was that Fitzgerald, who was under Thurber's primary supervision,³ was not treated in the same manner regarding warnings for absenteeism as other employees under Thurber's primary supervision - specifically Bowes. Bowes was absent 38 times over slightly more than a seven month period. Notwithstanding her attendance record (comparable to and slightly worse than the Complainant's 19 absences and 9 tardinesses over nine months), she received provisional rehire consideration and voluntarily termination status.

Further, Supervisor Evans (on a different shift than Fitzgerald) was even more lax in reporting absenteeism to Keller, resulting in an employee (Brill) being absent 41-plus times over slightly less than a ten month period, an absenteeism rate very comparable to the Complainant's. Yet, she had only received two warnings for absenteeism and was still employed at the time of the hearing.

Conclusion

Overall, I find several white employees with comparable or worse attendance records than the Complainant who were given longer employment periods and voluntary termination status with provisional rehire consideration (Bowes and Christianson) or are still employed (Brill). Further, I find that a white employee whose work performance has resulted in personal injury and has been less than satisfactory is still employed (Herring).

The Complainant has carried his burden of proof to show that work performance was a pretextual reason for his discharge, and in terms of absenteeism he was treated disparately from some of Respondent's white employees.

I have limited the backpay award to two months, however, because this is the length of time longer than the Complainant that Bowes and Christianson worked, and they were primarily supervised by Thurber, as was the Complainant. Though they are regarded as voluntary terminations with provisional rehire consideration, the evidence shows that at least Christianson would have been involuntarily terminated had she not failed to show. While Brill is still employed (despite her 41-plus absences), the evidence shows that she is primarily supervised on a different shift by Evans, and Evans is generally more lax in reporting absenteeism than Thurber. The difference in supervisors mitigates remedy but not liability, as it is clear that Keller learns of the absenteeism disparities at some point.

Signed and dated this 18th day of February, 1982.

Allen T. Lawent
Hearing Examiner

FOOTNOTES

¹Any employee who is described as "still employed" by the Respondent was employed, according to the evidence, as of the time of the November hearing in this case.

²Keller testified that the Respondent tightened up its absenteeism policies after Bowes' departure. While Brill, an employee with 41 plus absences, is still employed, the employer has instituted a policy since the Complainant's departure requiring that an employee be given a warning if the employee is absent 4 times in four weeks. However, Keller is dependent upon supervisors reporting such situations. The reporting (and consequently the issuance of warnings) is not consistent among supervisors.

³While Thurber was his designated supervisor, the evidence indicates that Wakley and possibly Dedrick also has occasion to supervise and/or observe the Complainant on the job.