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

Elias Goldsberry 2349 Allied Drive, Apt. 121 Madison, WI 53711 Complainant vs. Chem Lawn Corporation 1122 Stewart Street Madison, WI 53713 Respondent	RECOMMENDED DECISION Case No. 2967

A complaint was filed on June 22, 1982 with the Madison Equal Opportunities Commission, alleging discrimination on the basis of race in regard to employment. Said complaint was investigated by MEOC Investigator Mary Pierce and an Initial Determination, dated October 18, 1982, was issued concluding that probable cause existed to believe that discrimination had occurred or was occurring as alleged.

Conciliation failed and/or was waived, and the matter was certified to hearing. A public hearing was held commencing on August 2, 1983. Attorney Larry E. Rubin of the **KEN HUR LEGAL CLINIC** appeared tin behalf of the Complainant who also appeared in person; Attorney John Zawadsky of **MELLI, SHIELS, WALKER, and PEASE, S. C.** appeared on behalf of the Respondent who also appeared by employee-representative John Peckham. Based on the record of the hearing and after consideration of any (timely-filed) written post-hearing arguments submitted by the parties (a brief was submitted on behalf of the Respondent, but none was submitted by the Complainant), the Examiner proposes the following Recommended Decision:

RECOMMENDED FINDINGS OF FACT

1. The Complainant, Elias Goldsberry, is an adult, black male residing in the State of Wisconsin.
2. The Respondent, Chemlawn Corporation, is an employer doing business in the City of Madison, State of Wisconsin.
3. The Complainant was hired by the Respondent for a "part-time" job as a truck helper to assist lawn specialists in providing lawn care services. "Part-time" employees worked approximately forty (40) hours per week, but were hired on a temporary basis, usually not to exceed ninety (90) days. "Full-time" employees were those employees hired on a permanent basis.
4. The Complainant was told by the Respondent about the temporary nature of his employment at the time of his hire, and the Complainant was also informed that one or two more "full-time" lawn specialists positions might open in the near future. The Complainant expressed interest in a full-time opening," full-time" referring (among other things) to a permanent position.
5. The Complainant was also informed by the Respondent that he would earn $4.50 an hour to start as a truck helper, with a $0.50 per hour raise effective upon completion of his training. In

response to a question by the Complainant, the Respondent informed him, during an interview preceding his hire, that a full-time lawn specialist would start at $255.00 per week.

6. The Complainant began work for the Respondent on April 15, 1982.
7. The Complainant was the only black employee ever hired by the Respondent through the time of his discharge on May 3, 1982 at the Madison branch.
8. On April 23, 1982, the Complainant asked the Respondent's Office Manager, Peggy Gulan, for his pay check. He knew that another part-time employee, Chris Lewis, had received his check. Lewis, who was white, had been hired approximately a week before the Complainant.
9. Gulan informed the Complainant that none of the truck helpers who had started the same week as the Complainant had yet received their check. The Complainant then became angry and shouted at Gulan. The Complainant then left the office.
10. On April 28, 1982, the Respondent made a decision to hire Todd King, who was white, as a full-time lawn specialist. King had been working as a part-time truck helper. The Respondent also decided to give the Complainant and two other part-time truck helpers a $0.50 raise. Also, still two other truck helpers, who were both white, were not given a raise at this time.
11. On April 29, 1982, Branch Manager Lange and Assistant Manager Peckham met with the Complainant to inform him of the raise. At that time, the Complainant said he thought he had been making $255.00 a week. Lange then told the Complainant that he (the Complainant) was mistaken, that he (the Complainant) was a truck helper, and that he had been told that he was making $4.50 an hour and if he worked out he would receive a raise to $5.00 an hour. Lange also explained that $255.00 per week was paid to "full-time" lawn specialists. At the end of that conservation, the Complainant said that he guessed he knew that he was only being paid $4.50 an hour.
12. On April 30, 1982, the Complainant returned from working in the field and arrived at the office about 4:00 p.m. He came into the office and asked Julie Wittig, an office worker, for his check. Wittig gave the Complainant a check for the first week of his employment. The Complainant thought he had two checks coming and asked Wittig to look for the second one. The Complainant was talking in a loud voice, but was not shouting. Wittig looked again and told the Complainant there were no other checks for him.
    A short while later, the Complainant came back and asked Wittig who had taken his time slip. Wittig said that she hadn't. The Complainant insisted that someone had taken his time slip. Wittig responded that it was probably there (by the time card machine). The Complainant said that he had already looked there and that somebody had taken his time slip. Wittig went over to the time card machine and found the time slip in the crevice between the payroll tray and the wall.
13. The Complainant then went to Lange and Peckham's office. The door was open and the Complainant knocked on the door and then came into the office. The Complainant did not wait for Peckham to give him permission to enter.
    As the Complainant came in, he closed the door. The Complainant then started to walk toward Peckham who was seated behind his desk. The Complainant was yelling at Peckham, questioning him on why he (the Complainant) did not receive his check. Peckham started to explain to the Complainant that the check (the second check) took two weeks to arrive. The Complainant had begun shouting and demanding his money (now).
14. The Complainant continued to advance toward Peckham. As he advanced, he was shouting about his check and his money. Peckham began pushing his chair away from the Complainant as the Complainant was advancing. Peckham's chair hit his desk. The Complainant was towering over Peckham and Peckham stood up. The Complainant was now 6 inches from Peckham's face and continued to shout directly in Peckham's face.

15. Peckham began to explain that it was already past 5:00 p.m. in Columbus (Ohio) where the Company's main accounting office was located. He indicated that he could not do anything for the Complainant. The Complainant nevertheless continued to demand his money and then asked if Peckham could take some money out of petty cash. Peckham responded that it was against company policy to take money from petty cash, but the Complainant renewed his demand. Peckham then promised the Complainant that he would try to get his check expedited. Finally, the Complainant shrugged his shoulders and left.
16. Lange returned to the office later. At that time Peckham explained what had occurred between he and the Complainant regarding the Complainant's check. Peckham then recommended the Complainant's termination. Lange concurred in that recommendation.
    Shortly thereafter, the Complainant returned to the Respondent's offices. Lange intercepted the Complainant as he entered and asked him to go outside. The Complainant and Lange then went outside. The Complainant and Lange had a conversation during which the Complainant became angry and began shouting. The Complainant accused Peckham and Lange of being liars and said that Peckham and Gulan's statements that the Complainant had engaged in verbal abuse were "bullshit".
    At the conclusion of the discussion, the Complainant said as he left, "Your ass sucks wind, Lange. I'll see you in court."

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 doing business in the City of Madison within the meaning of Section 3.23, Madison General Ordinances.
3. The Complainant was not discriminated against by the Respondent on the basis of the Complainant's race in regard to discharge from employment in violation of Section 3.23, Madison General Ordinances.

RECOMMENDED ORDER

That this case be and hereby is dismissed.

MEMORANDUM DECISION

Essentially, the Complainant's version of the facts is not credible and is certainly not sufficient to carry the Complainant's burden of proof.

The Respondent has raised certain objections which, in light of my decision finding no discrimination, are not crucial to the outcome of the case. However, I will discuss some of those objections after discussing the merits of the case.

MEMORANDUM OPINION

I. MERITS OF THE CASE

Essentially, the Complainant did not carry his ultimate burden of persuasion to prove that racially discriminatory reason(s) more likely motivated the employer than the employer's articulated, non-discriminatory reason(s) or that the employer's pro-offered reason(s) is unworthy of credence.[1]

The Respondent's version of the facts, supported in various parts by up to three witnesses, is on the whole found to be more credible than the Complainant's version of the facts (supported solely by his own testimony). Specifically, the Complainant denied ever having raised his voice during the first paycheck incident (see Finding of Fact 9) and further denied manifesting any intimidating behavior toward Peckham and having become angry at Lange (see Findings of Fact 13 through 16). The Complainant's testimony is simply not supported by the weight of the evidence on the record.

Finding the Respondent's version of the disputed facts to be credible, the primary issue is whether the Complainant was nevertheless treated differently from the manner in which non-black employees were or would have been treated in regard to discharge. The only evidence in the record of an employee who had received warnings prior to discharge was evidence regarding a white employee, David Laubacher. Laubacher, a lawn specialist and carpet cleaning specialist for the Respondent hired in June of 1981, had previously worked for a Chicago branch and was considered by the Respondent to have had more than three years of continuous employment[2] at the time of his discharge in March of 1983. Laubaeher was terminated after exhibiting unacceptable conduct on several occasions, the most recent (prior to his termination) having been to verbally attack a receptionist at Wisconsin Office Supply. Laubacher had been counseled regarding earlier offenses prior to his termination.

The Respondent contends that Laubacher was a "full-time" or permanent employee (as opposed to the Complainant who was considered "part-time" or temporary) and was, therefore, subject to different disciplinary rules requiring progressive discipline prior to termination. In addition, the Respondent presented evidence of at least one white employee, employed as a "part-time" truck helper (like the Complainant), who was terminated without previous warning for a work-related offense(s).[3]

This case, then, is distinguishable from Morgan v. Community Action Commission, MEOC #2642 (Examiner's Decision, 2/12/82). In Morgan I held that the Madison Equal Opportunities Ordinance, while it may permit discharge without a warning, will not tolerate discriminatory application of a warning (or discharge) policy or practice.[4] Morgan also involved the discharge of a black employee over a paycheck dispute (although the facts in Morgan are otherwise somewhat different than in this case). However, the Complainant in Morgan carried his burden of persuasion to show that his discharge was discriminatory by showing that (even if one believed the Respondent's version of certain disputed facts) white employees who had committed more serious or comparable offenses were discharged only after progressive discipline or after having committed repeated violations or were not disciplined at all.

In the case at hand, the Complainant failed to show that he was treated differently from non-black employees in respect to discharge. Further, the Respondent, as discussed above, presented evidence that at least one other "part-time" employee had been terminated without prior warning while the Complainant presented no evidence that other "part-time" employees had received warnings prior to termination.

And the Complainant presented no evidence to rebut the Respondent's contention that Laubacher, as a "full-time" employee, was subject to a different set of disciplinary rules or to otherwise show that his discharge was discriminatory.[5]

II. PROCEDURAL MATTERS

While the various objections raised by the Respondent at different times during the hearing need not all be addressed here, particularly in light of the outcome of this case on the merits, I will address some specific points at this time.

A. The Examiner's Discretion in Ruling on the Respondent's Motion to Dismiss for (The Complainant's) Failure to Establish a Prima Facie Case of (Race) Discrimination.

The Respondent, in Footnote 5 of its brief, argues that the Examiner erred in not ruling on its motion, in the midst of hearing (after the Complainant rested) to dismiss for failure to establish a prima facie case of (race) discrimination. The Respondent cites U. S. Postal Service Board of Governors v. Aikens, 103 S.Ct. 1478, 31 EPD 33,477 (1983). Aikens simply does not support the Respondent's argument.[6]

Aikens holds, instead, that where a judge (or Examiner) has allowed all the evidence into the record (the Respondent's as well as the Complainant's evidence), the court should then be concerned with whether or not the Complainant has met his/her ultimate burden of persuasion to establish that unlawful discrimination has occurred rather than with the Complainant's interim burden of persuasion (to establish a prima facie case).

There is nothing in Aikens to buttress the Respondent's contention that the Examiner could not take the Respondent's motion under advisement (the effective equivalent of not ruling on the Respondent's motion) which allowed the Examiner to consider further evidence. The Examiner virtually always has the discretion to take interim motions of any kind under advisement.

B. The Examiner's Discretion to Call Witnesses

The Respondent objected to the Examiner having called Peckham (the Respondent's employee-representative) to testify. The Respondent claimed, for various reasons, that such action compromised the Examiner's neutrality.[7]

To the contrary, the Examiner finds that in an EOC administrative proceeding the Examiner has the discretion, rising often to the standard of a duty, to call witnesses (as well as to examine and cross-examine witnesses) in order to elicit and to clarify testimony which (s)he deems necessary to the clear presentation of the issues, regardless of whether any or all parties are represented by counsel.

In the first place, none of the cases cited by the Respondent support its contention that a trier of fact (the Examiner) compromises his/her neutrality simply by calling a witness. Instead, all of the cases cited (both state and federal) recognize the judge's (Examiner's) discretion to do so. Also, the cases cited by the Respondent virtually all involved jury trials (mostly criminal, some civil), all parties were presumably represented by counsel, and the appellate courts urged caution by the trial judges in exercising the discretion to call and/or examine witnesses because of the influence that the trier of fact may have on the jury (by excessive questioning, improper use of leading questions, prejudicial remarks, facial expressions, implied threats to witnesses and so on). In addition, some of these cases expressed a concern that attorneys would be reluctant to object to the judge's questions (particularly in the presence of a jury).

Despite the concerns expressed in the cases cited by the Respondent, few were reversed because a judge had called or questioned witnesses. Most were upheld, and the majority support the following expression of the law on this point stated in U.S. v. Brandt 196 F.2d 653:

> A trial judge . . . is more than a mere "moderator". . . but (s)he is decidedly not a "prosecuting attorney". . . s(he) enjoys the prerogative, rising often to the standard of duty, of eliciting those facts s(he) deems necessary to clear presentation of the issues . . . to this end (s)he may call witnesses on his (her) own motion, adduce evidence, and . . . examine those who testify.[8]

Further, the Examiner in an administrative proceeding (such as an EOC discrimination hearing) has even more discretion to call and/or examine witnesses than a trial judge in a criminal or civil jury trial. As there is no jury in these administrative proceedings, the concerns about influencing a jury are eliminated.[9] Additionally, the attorneys were specifically advised prior to the commencement of the Examiner's questioning of Mr. Peckham that they were free to make whatever objections they had (at any time during the course of the questioning).[10] Also, an administrative Examiner has presumably developed special expertise in the particular area of the law related to the case s/he hears and consequently is in at least as desirable position as a judge to determine which issues need to be brought into the record in order to make a fair and informed decision in a particular case.

Finally, the law is clear that a party who accuses an Examiner of bias is left with the burden of proving such bias.[11] The Respondent's only claim appears to be that the Examiner was biased by calling a witness (Mr. Peckham). Not even the Respondent's own citations back up its argument. The mere calling (and examining) of a witness does not establish bias on the part of the Examiner; rather it is within the Examiner's discretion (and in some instances, duty). Further, the Respondent alleges nothing from the record regarding the Examiner's conduct that would support a finding of bias. This is because, in this Examiner's view, there is nothing in the record to support the Respondent's allegations of bias. The Examiner simply acted within his discretion, in a fair and impartial manner, in calling a witness to elicit facts he deemed necessary to the clear presentation of issues in this case (and the Examiner would urge the Respondent to read the law in this area with greater diligence before making accusations of this nature in the future).

C. It Was Not Error to Deny the Respondent's Motions to Quash Examiner's Exhibit 1 and Such Evidence Could Be Let In for Whatever Probative Value It Had

The Respondent objected to the introduction of Examiner's Exhibit 1 on the grounds of relevance. A document prepared by the Respondent and regarding a white employee who had been discharged only after several recurrences of unsatisfactory behavior is surely relevant in a case where a black employee is alleging disparate treatment after being discharged without counseling or warning while the white employee had been counseled.

(The Respondent did, however, adequately explain that Laubacher's employment status as a "full-time" employee required that a different set of disciplinary rules be applied than to the Complainant, who was a "part-time" employee, and the Complainant failed to show this explanation to be pretextual.)

D. The Respondent's Objections to the Admission of Examiner's Exhibit 1

The Respondent continues to object to the admission of Examiner's Exhibit One on the grounds of authenticity. Yet, Atty. Zawadsky stated on the record that he had no objection to the authenticity of the exhibits because he was going to present them if it became necessary to present his case. This statement alone not only clouds any continuing objection the Respondent may have as to authenticity, but also casts doubt as to the validity of any of the Respondent's additional objections regarding

foundation for introduction (and receipt) and scope.[12] Given the outcome of the case, it serves no usefulness to belabor each technical point at this time.

In closing, the Complainant's case on the merits was simply not persuasive (and the weakness of the Respondent's various procedural objections are of little consequence given the outcome on the merits).

Signed and dated this 21st day of November, 1983.

Allen T. Lawent
Hearing Examiner

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1. Texas Dept. of Community Affairs v. Burdine, 1015. CT 1084, 25 EPD 31,544 (1981)

2. The Respondent did not consider, for its internal purposes, that an apparent gap in Laubacher's employment was significant. Laubacher had, apparently, not begun working in Madison immediately after he ceased working for the Respondent in Chicago. The significance of being a (full-time) three-year employee, according to Peckham's testimony, is that the regional manager had to be informed of his termination. On page 17 of the Respondent's brief, it is stated that "termination of a full-time employee had to be documented to the regional manager." This does not seem to be consistent with Peckham's testimony, which is to the effect that full-time employees were entitled to progressive discipline, but only (full-time) employees with three years or more of service were required to have their termination documented to the regional manager.

3. Bob Johnson, a white truck helper, was terminated without prior warning (or counseling) for leaving work without permission and refusing to wash trucks. While this evidence is a little probative on the Respondent's behalf, it is more probative that the Complainant did not present any evidence that any white employees were treated differently (except Laubacher, for which the Respondent had an adequate explanation).

4. See also McDonald v. Santa Fe Trail Transportation Company, 427 U.S. 273 (1976).

5. The Complainant attempted to show racial animus on the part of the Respondent by alleging that the Respondent treated him in a discriminatory manner (1) because he had a white "girlfriend," (2) because he was required to report to work at 6:00 a.m. when others were not, (3) because he was not notified of a company party, and (4) because he was told to not park in the parking lot (while other white employees allegedly did). The Respondent addresses these issues at pp. 12-15 of its brief. Without adopting each and every point of the Respondent's arguments, I do find that the evidence simply failed to support any of these four suballegations in order to establish any racial animus on the part of the Respondent (which may have been probative of the discharge issue).

6. In Aikens, a Federal District Court allowed all of the evidence into the record (consequently, if any interim motion to dismiss were made, it was denied or taken under advisement). A motion to dismiss was made after all the evidence was in. In rendering its decision in the matter, the District Court apparently ruled that the Complainant had failed to establish a prima facie case. A federal Court of Appeals reversed, determining the District Court had applied too stringent a standard to the Complainant regarding proving a prima facie case.

The U.S. Supreme Court reversed and remanded, stating that the lower courts should not have been bogged down, once all the evidence had been let in, with whether or not a prima facie case had been established. Rather, the court(s) should simply decide the ultimate case (whether the Complainant had carried the burden of proof on the discrimination issues). While the Supreme Court appears to agree that no discrimination had occurred in Aikens the case was remanded to assure that the law had been applied properly as the prima facie case burden had been improperly analyzed).

If on point at all, Aikens runs contra to the Respondent's assertion that the Examiner essentially had no discretion to take its interim motion under advisement and let all the evidence in before deciding.

7. See Footnote 5 of the Respondent's brief where the Respondent states various objections to the Examiner's having called Peckham (none of which are supported by the case law, including that law cited by the Respondent).

8. In addition to the fact that even the cases cited by the Respondent support a judge's or Examiner's discretion to call and/or examine witnesses (U.S. v. Marzano, 149 F. 2d 923, U.S. v. Karnes, 531 F. 2d 214, U.S. v. Brandt, cited above, Pollard, v. Fennell, 400 F. 2d 421, U. S. v. Welliver, 601 F. 2d 203 and Watson v. Chesapeake and Ohio Railway Co., 287 F. 2d 662 as well as Sec. 906.14 (1), Wis. Stats. and the Judicial Council Committee's Note which cites State v. Nutley, 24 Wis. 2d 527 and Welter v. Wisconsin, 855. Ct. 921), so do other Wisconsin cases of which Haugen v. Haugen, 82 Wis. 2d 411 (1978) is a recent one.

9. See, for example, Henderson-Bridges, Inc. v. White, 647 S.W. 2d 375 (1983) regarding a judge's examination of witnesses in a non-jury trial.

10. The failure to so advise would not necessarily have been error. However, the Examiner did so advise prior to his questioning of Goldsberry, who preceded Peckham.

11. As pointed out in Breunig v. American Family Insurance Company, 45 Wis. 2d 536,173 N.W. 2d 619 (1.970), misconduct by a trial judge (and, similarly, an Examiner) must find its proof on the record.

12. See Footnote 6 of the Respondent's Brief.