

**EQUAL OPPORTUNITIES COMMISSION
CITY OF MADISON
210 MARTIN LUTHER KING, JR. BOULEVARD
MADISON, WISCONSIN**

Derrick Wakefield
2705 Coolidge St
Madison WI 53704

Complainant

vs.

Simonson Brothers of Wisconsin Inc
3106 Commercial Ave
Madison WI 53714

Respondent

COMMISSION'S DECISION AND
FINAL ORDER

CASE NO. 20112017

EEOC CASE NO. 26B201100022

BACKGROUND

On January 28, 2011, the Complainant, Derrick Wakefield, filed a complaint with the Madison Equal Opportunities Commission (Commission). The complaint alleged that the Respondent, Simonson Brothers of Wisconsin, Inc., permitted harassment, denied him opportunities to advance, and terminated his employment because of the Complainant's race and color, in violation of the Equal Opportunities Ord. Sec. 39.03 Mad. Gen. Ord. He also alleged retaliation.

The Respondent denied that the Complainant was harassed or that race or color played any role in the decision to terminate his employment. The Respondent contends that the Complainant was terminated because of a history of reprimands, a decrease in the Complainant's attitude, and performance difficulties.

On November 2, 2011, the Hearing Examiner for the Equal Opportunities Commission held a public hearing on the merits of the complaint in this matter.

On April 19, 2013, the Hearing Examiner issued his Recommended Findings of Fact, Conclusions of Law and Order. The Hearing Examiner concluded that while the Complainant was more than likely harassed by customers and coworkers, he had not provided proof that he had reported this to management, and had not established a record that there was any discrepancy in pay between the Complainant and similarly situated coworkers nor that he was denied advancement opportunities based on his race or color. The Hearing Examiner found that the Complainant failed to meet his burden of proof as to all allegations in the complaint. The Complainant timely appealed the Hearing Examiner's Recommended Findings of Fact, Conclusions of Law and Order to the Commission.

The Commission provided the parties with the opportunity to submit briefs and other papers in support of their respective positions. Subsequent to the submission of all materials,

the Commission met on March 26, 2013 to consider the Complainant's appeal. Participating in the Committee's deliberations were Commissioners Fetty, Saiz, and Weier.

DECISION

The Commission hereby adopts the Recommended Finding of Fact, Conclusions of Law and Order issued by the Hearing Examiner on April 19, 2013 and incorporates them by reference as if fully set forth herein. Review of the record demonstrates that the Hearing Examiner's conclusions are fully supported. The Commission finds that although the Complainant likely suffered some harassment, and the Commission finds this troubling, the Complainant failed to carry his burden of proof. The Commission wishes to recommend that the Respondent review its policies and address issues in its work environment to ensure that no employee is subject to negative behaviors in its workplace.

ORDER

For the foregoing reasons, the complaint is hereby dismissed.

Joining in the Commission's decision are Commissioners Fetty (Chair), Saiz, and Weier.

Signed and dated this 16th day of June, 2014.

EQUAL OPPORTUNITIES COMMISSION

Bill Fetty
Chair

cc: Paul Burant
Cory A Buye

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HEARING EXAMINER'S RECOMMENDED
FINDINGS OF FACT
CONCLUSIONS OF LAW AND ORDER

CASE NO. 20112017

EEOC CASE NO. 26B201100022

On November 2, 2011, the Hearing Examiner for the Equal Opportunities Commission, Clifford E. Blackwell, III, held a public hearing on the merits of the complaint in the above-captioned matter. The Complainant, Derrick Wakefield, appeared in person and by his counsel, Paul Burant of Community Justice, Inc. The Respondent, Simonson Brothers of Wisconsin, Inc. appeared by its corporate representative Jeff Simonson, and by its counsel, Cory Buye of Sweeney and Sweeney, S.C.

Based upon the record of proceedings including the hearing, the Hearing Examiner now issues his Recommended Findings of Fact, Conclusions of Law and Order.

RECOMMENDED FINDINGS of FACT

1. The Complainant is a black, African American male.
2. The Respondent is a corporation with its principle place of business located at 3106 Commercial Avenue in Madison, Wisconsin.
3. The Respondent sells, provides and installs water heaters in commercial and residential settings.
4. The Complainant began his employment in September of 2008 as a Delivery Driver. The Respondent terminated his employment in December of 2010.
5. The Complainant initially found out about a job vacancy from Steve Tiedt, the Respondent's Sales Manager, because Tiedt had known the Complainant for a number of years. The Complainant submitted an application and was selected from several applicants for the Delivery Driver position by John Dean, the Respondent's Office Manager.

6. The Complainant began experiencing difficulties on the job shortly after beginning his employment. He expected that plumbers, the Respondent's primary customers, were expected to assist him with unloading new water heaters and loading used water heaters on his truck. The Complainant found the attitudes of the plumbers to often be demeaning and he felt as if they treated him as a "sub-human".
7. The Complainant sometime experienced being called "boy" by plumbers and was often rushed to complete his deliveries.
8. The Complainant reported his difficulties with plumbers to the managers at the Respondent. It is not clear that he reported the instances of being called "boy". The Complainant was told that if he had difficulties with deliveries that he should call the Respondent's office for assistance. Others in the Respondent's office indicated that the plumbers were their customers and the Complainant needed to satisfy the customers and that he should work hard.
9. After one particularly difficult delivery, the Complainant, upon returning to the Respondent's office, made a comment that it "was like the '60s". It is not clear that any racially explicit language had been used during his delivery or if the Complainant again felt underappreciated.
10. Upon hearing the Complainant's statement of frustration, Steve Tiedt stated something to the effect that the Complainant should be glad it wasn't the "'60s" because they'd be "beating his ass."
11. The Complainant was upset by Tiedt's statement, especially given their personal connection. Tiedt did not intend the statement to be hurtful.
12. On another occasion, the Complainant states that Dean, the Respondent's Office Manager, told him that if he wanted to advance in the company he needed to do more than be a grunt or a slave.
13. The Complainant was upset by Dean's statement.
14. One of the Complainant's coworkers, Mitchell Carlson, a white Delivery Driver, told racially offensive jokes and asked racially inappropriate questions about items seen on the news on a television in the Respondent's office. For the most part, Carlson's statements were made to the Complainant out of the presence of others in the office.
15. The Complainant did not report Carlson's comments to managers in the office.
16. The Complainant was dissatisfied with his pay. He received the same starting pay as all other Delivery Drivers regardless of race or color. Dean set the level of pay for Delivery Drivers after investigation of other similarly situated jobs. The Complainant's initial hourly wage was \$12.00. After six months his pay was increased by \$.50 and after approximately a year his wage was raised an additional \$1.00 to \$13.50.

17. The Complainant wished to advance within the company to make more money. He frequently did not work the number of hours permitted per week. He did not take advantage of opportunities suggested to him by Dean or others.
18. Dean, the same individual responsible for hiring the Complainant, terminated him in December of 2010. The Complainant was not told why he was terminated other than that "It was not working out." The Complainant was not given a written statement of termination.
19. The Respondent states that the Complainant was terminated because of a history of reprimands, a decrease in the Complainant's attitude and performance difficulties.

CONCLUSIONS OF LAW

1. The Complainant is a member of the protected classes "race" and "color".
2. The Respondent is an employer within the meaning of the Equal Opportunities Ordinance.
3. The Complainant was not subject to harassment on the basis of his race or color by a manager of the Respondent.
4. The Complainant may have been harassed by customers of the Respondent because of his race or color, but he failed to report those incidents.
5. The Complainant's coworker, Mitchell Carlson, harassed him because of his race and/or color, but the Complainant failed to report those incidents to his supervisors.
6. The Complainant received the same or a better rate of pay than other similarly situated employees regardless of his race or color.
7. The Complainant was not denied any opportunity to advance within the Respondent on any basis.
8. The Complainant's termination was not motivated by his race or color.

ORDER

1. The complaint is dismissed.
2. The parties shall bear their own expenses.

MEMORANDUM DECISION

The record in this matter is somewhat distorted by the fact that the Complainant retained counsel very late in the proceedings. It appears that the Complainant retained counsel only after the deadlines set forth in the Scheduling Order had lapsed. This undoubtedly had a substantial affect upon the Complainant's presentation and preparation.

Normally, the Hearing Examiner might not comment on this circumstance except that the Respondent, in its briefs, makes comment on the lack of witnesses presented by the Complainant. As the Respondent opposed allowing the Complainant the opportunity to extend the dates contained in the Scheduling Order, the Hearing Examiner feels that the record needs to be somewhat balanced in this regard.

The Hearing Examiner does not offer any opinion on the extent to which the outcome of this matter might differ if the Complainant had been represented at an earlier date. However, the Hearing Examiner does believe it is appropriate to indicate that the Complainant's failure to call corroborative witnesses was likely not a matter of tactical or strategic choice.

The Complainant states three general claims of discrimination all based upon his race and or color. First, he contends that he experienced harassment in his working conditions both on the part of customers and coworkers and from his supervisors or managers. Second, the Complainant asserts that he was denied the opportunity to advance from his position as a delivery driver to some other position that might be less physically demanding. Third, the Complainant contends that his termination was motivated by his race and or color.

The Hearing Examiner will begin with the claims of racial harassment. Generally speaking, whether the alleged harassment comes from a customer, coworker or a supervisor, there are several elements which must be proven. In order to prevail, a Complainant must demonstrate a pervasive pattern or practice of patently offensive language or conduct of a racial nature that is sufficiently severe to interfere with the Complainant's ability to perform his or her job duties. In the case of harassment by a customer or coworker, it must be demonstrated that the employer either knew or reasonably should have known of the harassment and failed to take reasonable steps to eliminate the conduct. In the case of harassment by a supervisor, the knowledge of the employer is presumed and the opportunity to correct is either truncated or eliminated. Generally speaking, the Commission is much less tolerant of harassment by a supervisor as the Commission believes that employers have had adequate time to become familiar with the requirements of the Equal Opportunities Ordinance and the equivalent state and federal laws. Vance v. Eastex Packaging, (Case No. 20107, Decision on 05/21/1985), Guyton v. Rolfsmeier, (Case No. 20424, Decision 04/28/1986)

The Complainant states claims for his harassment in both general areas, one against customers and coworkers and a second claim against supervisors of the Respondent. The Hearing Examiner will begin with the claim of racial harassment by a supervisor.

While the Complainant testified that others constantly harassed him at his place of work, he does not specify the actual method or manner of harassment with the exception of two incidents in particular. While the Hearing Examiner understands that the Complainant felt underappreciated, his general complaints about harassment by supervisors do not demonstrate the basic elements of a claim of racial harassment. Rather, his more general complaints indicate that the Complainant wished for more pay and others did not apparently share that he had a keen appreciation of his worth in the workplace and this created a difficult and unsatisfactory work environment for the Complainant. However, the more general complaints do not establish that the Complainant was subjected to a pervasive pattern or practice of patently offensive language or conduct of an explicitly racial nature stemming from the supervisors at the Complainant's workplace. Jeff Simonson, Respondent's President and one of the Respondent's

owners, and John Dean, the Respondent's General Manager, both testified that comments of a racial nature would not be and were not tolerated. Simonson indicated that though there were occasionally "off color" jokes or comments, these were the exception and not the rule. Both Simonson and Dean testified about being uncomfortable when they heard that the Complainant and a coworker, Brian Tiedt, used a racially descriptive nickname for the Complainant in the workplace. Both Simonson and Dean testified that they spoke with the Complainant about Tiedt's calling the Complainant either "Chocolate" or "Chocolate Man". It was their impression that the Complainant did not find the nickname objectionable.

Though the Complainant testified that his supervisors were hard on him and failed to be supportive, his testimony fails to detail or explain how this conduct was either explicitly racial in nature or was patently offensive. The Hearing Examiner understands that the Complainant was extremely unhappy with the work environment, but cannot find that the Complainant's dissatisfaction establishes the minimum criteria of a claim of harassment.

The Complainant did testify with respect to two specific incidents involving racially questionable statements made by supervisors. Before addressing the individual circumstances, the Hearing Examiner finds that the fact that the two incidents involved different supervisors and represented two distinct and separate incidents does not represent a pervasive pattern or practice of discriminatory conduct. The fact that the specific incidents described by the Complainant are isolated and individual incidents means that the conduct falls short of creating the type of racially hostile workplace that is necessary to demonstrate a claim for racial harassment. In this regard, the Hearing Examiner does not intend to minimize the impact of these incidents on the Complainant, but does find that they, by themselves, cannot establish illegal discrimination under the terms of the ordinance.

The first incident involves a statement made by Steve Tiedt. The Respondent contends that Tiedt was not the Complainant's supervisor and the higher standard of conduct for supervisors should not apply to him. The Hearing Examiner finds that Tiedt possessed sufficient supervisory authority that his conduct can be judged under the standards applicable to supervisors.

Tiedt was the Respondent's Sales Manager. Simonson indicated that Tiedt was essentially the third person in charge of the office behind himself and Dean. In the absence of Simonson and Dean, Tiedt would have had authority to make assignments and decisions necessary to the operation of the business. As Sales Manager, Tiedt did occasionally give delivery drivers such as the Complainant assignments with respect to deliveries. Tiedt shared an office with Dean and Tiedt's name appears as the supervisor on one of the written reprimands issued to the Complainant.

While the Respondent insists that Dean was the Complainant's supervisor, this appears to be an overly simplistic view of how things actually worked in the Respondent's office. The Hearing Examiner is convinced that Tiedt had actual and constructive supervisory authority for the Complainant. He made job assignments, was available to assist the drivers and took disciplinary action with respect to the Complainant. The Hearing Examiner finds that in total, Tiedt had sufficient indices of authority to be considered a supervisor of the Complainant.

On a date not disclosed in the record, the Complainant returned from a delivery that he had found difficult for a number of reasons. As the Complainant passed Tiedt, the Complainant

commented something to the effect that it felt like the 1960s to him. By this he meant to indicate that he was not valued because of his race and he had felt belittled by the customer whose delivery he had just made.

The Complainant testified that Tiedt made a statement to the effect that the Complainant was fortunate it was not the 1960s because they would be "beating his ass." The precise words of the statement are not clear, but everyone agrees that Tiedt stated something close to that sentiment.

The Complainant believed that Tiedt made light of his original statement and made his statement with a smile and offered a "high 5" at the end. In testifying about Tiedt's statement, the Complainant demonstrated great emotional hurt and a sense of betrayal on the part of Tiedt. The Complainant states that he objected to Tiedt's statement to both Dean and Simonson.

Tiedt testified that he did not intend to belittle the Complainant and offered his comment in the spirit of the historical context because the Complainant had mentioned the 1960s and Tiedt and the Complainant had previously been discussing leaders of that period such as Malcolm X and Martin Luther King, Jr.

Any objective view of this incident would find that Tiedt's statement was insensitive and hurtful. It was racially based and addressed to the Complainant. The record, however, presents a somewhat more complicated picture of the transaction. Tiedt knew the Complainant prior to the Complainant's employment with the Respondent. Tiedt's wife worked at the Complainant's middle school and brought the Complainant home as well as other middle school students. Tiedt coached the Complainant along with Tiedt's son on their Pop Warner football team. When the Complainant lost his job at another Madison work site, Tiedt made an initial contact with the Complainant that led to the Complainant's hire by the Respondent.

This personal history between the Complainant and Tiedt complicates the Hearing Examiner's view of the incident between Tiedt and the Complainant. It certainly explains the Complainant's emotional testimony and sense of betrayal by Tiedt on the part of the Complainant. It also may explain Tiedt's treatment of the Complainant in a somewhat paternalistic manner. It does make the statement, though admittedly offensive somewhat more understandable, given the context of the relationship shared by Tiedt and the Complainant.

Despite the personal history between Tiedt and the Complainant, Tiedt, as a person with some degree of supervisory authority, had a duty not to engage in conduct that was demeaning or harassing on any basis much less on the basis of race or color. However, the fact that the Complainant testified to only this single incident involving Tiedt irreparably damages his claim of harassment on the part of his supervisor.

While the incident involving Tiedt is serious, by itself, it is insufficient to establish a pattern or practice of supervisory harassment. Even given the Commission's more serious attitude about harassment, a single incident such as described herein fails to create liability on the part of the Respondent. The ordinance does not contemplate a per se standard in which even a single incident can establish a violation of the ordinance.

The second incident testified to by the Complainant relates to a conversation the Complainant had with John Dean. The Complainant indicates that in response to his request for

more responsibility or a higher wage, Dean told the Complainant that he needed to do more around the workplace than to be a "grunt or slave." Dean denies having made such a statement, but agrees that the Complainant did frequently question him about how he (the Complainant) could make more money. The Complainant testified that Dean's statement made him feel sub-human and worthless.

There can be little doubt that the word "slave" in connection with a black, African American bears significant negative connotations. In the context of this transaction, accepting for the moment that it occurred as outlined by the Complainant, it is not so clear that the word "slave" was intended to have a racial meaning as opposed to a meaning more like a lack of power. However, in the days, a supervisor should certainly know that certain words are likely to have meanings well beyond those intended.

However, as with the Tiedt incident, the fact that this is the sole circumstance to which the Complainant testified with any detail is fatal to his claim. As noted above, despite the ordinance and Commission's heightened concern for supervisory harassment, a single incident particularly of language alone, is insufficient to establish liability for a hostile workplace claim of harassment.

Even if the Hearing Examiner were to combine the Tiedt and Dean comments, they do not rise to the level of a hostile workplace without more. The Hearing Examiner cannot find that two separate comments by two different supervisors unconnected with each other and particularly given the nature of the surrounding events, establishes that the complainant was exposed to a hostile workplace.

The Complainant's failure to identify other specific instances of harassing conduct by supervisors of the Respondent prevents the Hearing Examiner from finding any persistent pattern or practice of harassing conduct. The Hearing Examiner understands that it is the Complainant's position that he experienced near daily harassment both at the hands of coworkers and supervisors, but his mere recitation of that claim without examples and corroborative evidence does not demonstrate the validity of his claim. Repetition, no matter how sincere, does not substitute for evidence.

The Complainant also charges that he was subjected to harassment by the customers of the Respondent as well as from nonsupervisory coworkers such as Mitchell Carlson and Brian Tiedt. The testimony on the part of the Complainant as to his assertion that the customers of the Respondent subjected him to harassing conduct is sparse and mixed.

It must be noted that as a provider of water heaters and support of those products, the Respondent's primary customers are plumbers or plumbing contractors. The position of Delivery Driver, held by the Complainant involved taking an ordered water heater from storage, placing on the delivery truck, delivering the heater to the customer (generally at the location of installation), placing the heater ready for installation, removing any old water heater, placing the old equipment in the truck and returning the used heater to the Respondent's for recycling or disposal. This is a physically demanding job and more than occasionally, the assistance of another individual was necessary. The Complainant testified that he had been told that the plumber was expected to provide assistance when needed. Simonson and Dean testified that plumbers expected that the Respondent was responsible for placing the new water heater for installation though, if possible, plumbers would assist if needed.

The Complainant stated that on most occasions, the plumbers would treatment without respect and simply as "hired help" and frequently directed him to hurry to complete the delivery. The Complainant also testified that he was sometimes called "boy" or other disrespectful names.

The Complainant stated that he reported these problems to Dean, Tiedt and others at the Respondent's, but was told to "shake it off" or to do his job and to work harder rather than having someone in management address his complaints.

As with his other claim of harassment, the Complainant fails to provide sufficient details about the circumstances of his harassment for the Hearing Examiner to conclude that a violation of the ordinance has occurred with respect to the claims relating to the Respondent's customers. While one might be willing to accept a stereotype of a plumber being conservative and likely to hold discriminatory attitudes, the Hearing Examiner cannot utilize such stereotype to replace evidence such when an event occurred, who made such a statement and to whom was it reported or who overheard it. Unfortunately, the Complainant provides no such evidence. Also it appears that there may have been a misunderstanding on the part of the Complainant as to the level of assistance that could or should be expected from customer plumbers. Simonson and others testified that plumbers were the consumers of the Respondent's delivery services and had a right to expect that the Respondent would provide the water heater without assistance from the plumber. That plumbers might help if assisted was not an expectation of the Respondent. Plumbers had other work to perform on site and occasionally had physical limitations such as bad backs that prevented them from assisting. It is for that reason all Delivery Drivers were instructed to call the Respondent's office if assistance was needed.

It is clear that the Complainant believed that he was not treated with the respect or consideration that he felt he was due by some or many of the Respondent's customers. It is not clear, with the exception for use of the word "boy", that any customer acted in a manner that could be called discriminatory. With respect to those who used discriminatory language with the Complainant, the record is incomplete and fails to demonstrate that discriminatory conduct occurred. Similarly, the Complainant's assertions that he informed the management of the Respondent about his concerns or complaints regarding his treatment by customers is not clear in the record. It appears that there is support for the Complainant's contention that he complained about the lack of assistance he was receiving from the customers, but there is insufficient support in the record to conclude that the Complainant complained about discriminatory language or treatment at the hands of the customers.

The record with respect to the Complainant's allegation of harassment by coworkers is somewhat different. The Complainant offers a greater level of detail with respect to his claim of harassment at the hands of Mitchell Carlson. The Complainant also offers contradictory testimony about possible harassment at the hands of Brian Tiedt.

The Complainant testified at various times that he liked Brian Tiedt and that Tiedt told racially inappropriate jokes. The Hearing Examiner assumes that there is a familial relationship between Steve Tiedt and Brian Tiedt, but the nature of that relationship is not disclosed on the record.

The exact nature of the harassment that the Complainant asserts he experienced at the hands of Brian Tiedt is unclear. While the Complainant gives examples of jokes and comments made by Carlson, he fails to provide such information about Brian Tiedt's conduct. From the record, he seems to assert that Brian Tiedt told inappropriate jokes or acquiesced in the inappropriate conduct of others. However, the record does not describe the conduct or provide information from which it can be determined when the conduct occurred or when or to whom it was reported.

In counterpoint to the Complainant's allegations against Brian Tiedt, the Complainant describes inappropriate comments made by Carlson such as questioning the Complainant if he knew African Americans who had been arrested or if the Complainant took illegal drugs such as crack cocaine. The Complainant gave details of a racially offensive joke told by Carlson involving African Americans, the rape of a woman and a basketball. The Complainant testified that Carlson was generally careful to speak to the Complainant about these matters to avoid witnesses. The Complainant indicates that Carlson would harass him outside or in the back when no one else was around.

Carlson denies having made any of these statements. The Complainant asserts that he complained to Dean and others about Carlson's statement, but that nothing was done. Carlson admits to having been reprimanded for making an inappropriate statement to or in the presence of the receptionist, Nancy (last name unknown). Dean denies that the Complainant informed him of Carlson's harassment or that he (Dean) ever observed such conduct on Carlson's part.

As is often the case, decision of this allegation comes down to an issue of credibility. At all times, it is the burden of the Complainant to establish by the greater weight of the credible evidence that his explanation of events is more likely than that provided by another witness or by another party. If the Complainant is found to be less credible than others, he does not carry his burden of proof and he loses. If he only convinces the Hearing Examiner that he is as credible, but no more credible than others, he fails to carry his burden of proof and he will lose. If however, he convinces the Hearing Examiner that he is more credible even if only slightly, he carries his burden of proof and he may prove his claim all other evidence being equal.

Judging credibility is more of an art than a science. It relies upon observations of conduct, attention to nuance in speech and use of language, consideration of the weight of evidence and the detail with which it is given as well as many other intangible factors. The credibility of a witness may depend upon the incentive for a witness to testify in one manner or another. A conclusion that a witness' testimony is credible or not in one context does not require a finding that it is similarly credible or incredible in all contexts. Finally, a finding that witnesses on opposite side of an issue both appear credible is not impossible, but will represent a failure of one's burden of proof.

In the present matter there are several credibility determinations that must be made along with application of those determinations to the allegations of discrimination. The first issue is whether the Complainant's testimony concerning his allegation that Carlson racially harassed is credible or not.

The Hearing Examiner finds that the Complainant's testimony regarding Carlson's conduct is credible. Where in many other portions of his testimony the Complainant was vague and lacked details, his description of the particular ways in which Carlson harassed him are

clear and understandable. While details of dates and precise locations are lacking, the Complainant's recall of the details of a racially offensive joke are convincing. The Hearing Examiner finds nothing manufactured in the details presented by the Complainant in regards to his treatment by Carlson. It is true that the Complainant's testimony could be expected to favor his allegations, but that will likely be true of any witness or party.

That the statements testified to by the Complainant represent racial harassment cannot be disputed. The joke reported on the record is offensive and is clearly racial in nature. Questioning someone if they know an arrestee seen on the television simply because of shared skin color or asking questions about drug use because of one's race are clearly offensive and involve racial stereotyping and are, if not intended to wound or belittle, at least represent a lack of sensitivity that is actionable.

Carlton denied having told any racially inappropriate jokes or making inappropriate statements to the Complainant. Others in this regard corroborate Carlton's testimony such as Dean. While Carlson denied having made any such statements, he did indicate that if he had made any statements that offended the Complainant, the Complainant had not mentioned them to Carlson. Carlson also indicated that he believed that he must not have offended the Complainant, because, the Complainant frequently accepted rides home or to the gym from Carlson.

Generally speaking, Carlson's testimony seemed to be open and given without evasion. However, Carlson was not questioned closely on the statement the Complainant alleges him to have made by either counsel. Carlson seems to have equivocated somewhat when he indicated that if he had offended the Complainant, the Complainant had not complained and did not act in a manner that would indicate offense. Carlson did indicate that Dean reprimanded him for making statements that had offended another employee. Carlson testified that he observed the Complainant did feel unappreciated.

While the Hearing Examiner generally finds Carlson's testimony to be credible, there is sufficient doubt in its thoroughness and in its equivocation that the Hearing Examiner finds that the Complainant's testimony that he was subjected to unwelcome racially offensive language while employed by the Respondent is more credible than the Respondent's testimony that he was not. Having established that the Complainant experienced racial harassment from a coworker or coworkers, the next question is whether the Complainant reported that harassment to the Respondent's management and gave it the opportunity to put an end to the harassment.

The Complainant testified that he informed Dean and Simonson about his treatment. Both Dean and Simonson deny that the Complainant informed them. Dean indicates that he observed that the Complainant appeared unhappy, but that he was not forthcoming as to the reasons for his unhappiness.

While the Hearing Examiner finds that the Complainant was more than likely harassed by Carlson, the record as to his reporting the harassment to management is not proven to the requisite degree. The Complainant made it clear that he was an extremely proud and independent individual. He testified repeatedly that he simply wished to be left alone to do his job. Given the conflicting testimony between the parties as to the extent that the Complainant reported his harassment to Dean or other members of management, it remains the Complainant's burden to establish that it is more likely than not that he reported his harassment.

The Hearing Examiner cannot conclude that the Complainant has met his burden with respect to this element. While Dean certainly has incentive to deny the Complainant's reports, the Complainant has as much incentive to testify that he made the reports. Given the fact that the Complainant appears to have shied away from causing problems and sought to be left alone, the Hearing Examiner concludes that it is as likely that he did not report his harassment as that he did.

The Hearing Examiner is somewhat troubled that Dean testified that he observed that the Complainant seemed to withdraw and be unhappy in his employment and that Dean was unable to determine a cause for the Complainant's conduct. Dean testified that he repeatedly asked the Complainant and made himself available to speak with the Complainant about anything that might be bothering him only to be rebuffed by the Complainant. On one hand, the Hearing Examiner wonders if there was more that Dean could or should have done to satisfy himself that there was not a work cause for the Complainant's unhappiness. On the other hand, when faced with what Dean describes as an uncooperative employee, and a very small workforce, there does not appear to be much more that Dean could have done.

Reporting harassment or demonstrating that an employer reasonably knew or should have known is an essential element in a claim of racial harassment. Failing to demonstrate by the greater weight of the credible evidence that either he reported the harassment to management or that management should have reasonably known of the harassment, the Complainant fails to meet his burden of proof with respect to this claim.

The second claim presented by the Complainant at the time of hearing is that he was either not paid sufficient or he was denied opportunities to advance within the Respondent's workforce because of his race or color. Since there is no question of the Complainant's membership in his protected classes of race and color, the analysis of this claim turns to the second and third elements of a *prima facie* claim. The second element is whether the Complainant experienced an adverse employment action. The third or final element is that assuming an adverse employment action has been demonstrated, a causal link between the Complainant's protected classes and the adverse employment action exists.

It appears that there are essentially two claims made by the Complainant in this regard. First, the Complainant asserts that for the work he performed, he should have received a higher rate of pay. Second, the Complainant contends that though he requested the opportunity for advancement, he received no support for his request.

There is no doubt that the job of Delivery Driver was physically demanding and difficult. However, the record indicates that all Delivery Drivers began work at an hourly wage of \$12.00 and that raises were given from time to time thereafter. The Complainant testified that he received a \$.50 raise after his first six months and then a \$1.00 increase approximately a year after beginning his employment. This put his wage at \$13.50 per hour at the time of his termination. This was \$.50 more than Carlson, a white employee, was making after approximately the same period of employment. The record does not support a claim that the Complainant's race or color played any role in the rate of his pay.

At one point in his testimony, the Complainant offered an opinion that for what he and other Delivery Drivers did, the pay should have been more like \$18.00 per hour. The Hearing Examiner has no authority to make such determinations. Dean testified that in setting the level

of compensation, he attempted to determine a competitive wage with similar work. There is nothing in the record to indicate that this was done in any discriminatory manner.

The wage is what the wage is. The Complainant and all other Delivery Drivers, regardless of race or color started at that wage. Had it been insufficient for the Complainant, he was free to seek employment elsewhere at a wage more commensurate with his needs or desires.

As for the Complainant's contention that he was denied the opportunity for advancement because of his race or color, the record is equally sparse. There is nothing indicating that there was any career ladder from Delivery Driver. It would appear that the only positions beyond Delivery Driver that one might hope to train for would be Sales Manager or Technical Support. The Complainant testified that he had occasionally seen or accompanied Brian Tiedt on service calls and was interested in possibly training for that position. However, at other times, the Complainant indicated that he didn't have interest in or a sufficient background for training for a service position. Dean indicated that the Complainant had declined offers to send him along on calls with Tiedt.

What does seem clear from the record is that the Complainant frequently did not take advantage of the hours available to him as a Delivery Driver. There is no contention that the Respondent's position that it would guarantee each driver a 40 hour work week is not correct. Equally, it appears that with some degree of frequency the Complainant asked to be excused from work when deliveries had been completed and there was only "make work" available to fill the remaining hours. While the Hearing Examiner does not discount the Complainant's desire to take care of other obligations, the fact that he did not take advantage of the hours available to him to either train or to learn more about the Respondent's business, indicates that he lacked a true motivation to advance within the limited framework of the Respondent's workforce.

Nothing in the record establishes that the Complainant was either paid less than comparably situated white employees or that he was denied any limited opportunity to advance or to training for advancement because of his race or color.

The final claim presented by the Complainant is that his termination was motivated, at least in part, by his race or color. In this claim, the only element of the *prima facie* claim that is in question is whether there is a causal link between the Complainant's protected classes and the adverse action of his termination. As is frequently the case, the Complainant lacks direct evidence of such a link and relies upon inferences of discrimination raised in the record.

Essentially, the Respondent states that it decided to terminate the Complainant's employment after a series of reprimands, a worsening attitude at work and a decline in the Complainant's performance. The Complainant argues that the fact that the Respondent provided no explanation for its decision other than "It's not working out." and provided no written notice of termination indicates that the Respondent's explanation was pretextual.

In addition to his explanation about the nature of his actual termination, the Complainant asserts that he was treated less favorably than a similarly situated white employee, Carlson, in that despite an admitted history of reprimands, Carlson was not terminated while the Complainant was terminated.

The Hearing Examiner finds that there are competing inferences at play in this record. On one hand, the Respondent benefits from an inference of no discrimination created by the fact that Dean both hired and fired the Complainant. In general, it is presumed that if one were to discriminate against one, it is easier not to hire the individual in the first place than it is to hire and then fire an individual after some period of time. There is also a tendency to believe that once hiring an individual, a manager will tend to want to see that employee succeed and therefore discrimination is less likely.

This inference might be weakened slightly in the present case since the Complainant was "recruited" to the position by Steve Tiedt another manager of the Respondent. However, it appears that the Complainant was not the only applicant for the Delivery position when he applied and that he was considered to be the best candidate at the time.

The fact that the Respondent did not provide other than a general explanation for its termination decision and did not document the termination in writing may create a contrary inference i.e. that the Respondent had something to hide in its decision. This inference is weakened somewhat by Dean's testimony that the Respondent has never put termination decisions in writing. Dean testified that he has terminated several other employees.

There is another inference against discrimination created by the fact that the Respondent, at the time of the Complainant's termination, employed at least one other African American in the position of Delivery Driver, Marcus Martin. The Complainant attempted to minimize this inference by describing Martin as a light skinned African American. The Hearing Examiner is not convinced that the relative darkness of skin tone plays any motivating factor in this complaint.

The inferences in this matter are inconclusive with respect to the ultimate issue in this allegation. The heart of the Complainant's claim is that the Respondent did not fire Carlson despite a history of disciplinary reprimands, while the Respondent, in part, relies on the Complainant's history of reprimands to support his termination. The Hearing Examiner is unconvinced by this position.

First, Carlson left the employment of the Respondent after a period of employment shorter than that of the Complainant. Carlson's separation from the Respondent was voluntary, but had he continued to have disciplinary issues, there is no telling what his fate might have been. Essentially, the Complainant requests the Hearing Examiner to speculate about Carlson's fate and the Hearing Examiner will not do so.

Second, while the Complainant's disciplinary record, according to Dean played a part in the decision to terminate his employment, it was not the only factor. Really, the ultimate reason for the Complainant's termination appears to be that he was unhappy with his job and the circumstances of his life with the job and that unhappiness adversely affected his work and his disposition on the job. In this light, the Complainant's record of discipline is reflective of the Complainant's loss of interest in his position.

While the Hearing Examiner does find the Respondent's failure to document its termination decision troubling, the Hearing Examiner concludes that the Complainant fails to present sufficient evidence for the Hearing Examiner to conclude that his race or color was a motivating factor in the Respondent's decision. The Complainant bears the burden of proof at all

points and as to all elements and he has failed to carry that burden as to either the existence of a causal connection or that if such a causal connection has been made that the Respondent's explanation is pretextual.

The Hearing Examiner finds this matter to be very difficult. The Complainant strikes the Hearing Examiner as an intensely proud person who feels deeply about his treatment during his employment with the Respondent. The Respondent has given both the Complainant and the Hearing Examiner some reason to be concerned about the Complainant's treatment. However, the Complainant, in the mind of the Hearing Examiner, has failed to carry his burden of proof with respect to the elements of his claims. Whether this outcome might have been different had the Complainant retained counsel earlier in the process is impossible to tell.

Signed and dated this 19th day of April, 2013.

EQUAL OPPORTUNITIES COMMISSION

Clifford E. Blackwell, III
Hearing Examiner

cc: Paul Burant
Cory A Buye