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

Barbara Hardin 101 East Mifflin Street Madison, Wisconsin 53703 Complainant vs. Swis Colony, Inc. 1225 East Washington Avenue Madison, Wisconsin 53703 Respondent	RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER EOC Case 2323

RECOMMENDED FINDINGS OF FACT

1. Respondent does business and employs persons at its factory at 1225 East Washington Avenue, Madison, Wisconsin.
2. Complainant Barbara Hardin is a black female.
3. Complainant Barbara Hardin was hired by Respondent as a "Line Worker" on October 20, 1976, and ordered to report for work at 4:30 p.m. October 21, 1976 (Respondent's Exhibit #3).
4. Complainant sought and received a transfer from one production line to another in order to eat her meals with another black employee.
5. During her employment at Swiss Colony, Complainant on numerous occasions insulted and used profanity toward other employees.
6. During her employment with Respondent, Complainant often left her work position without informing her supervisor thus disrupting production.
7. Complainant left her work position to go to the bathroom an inordinate number of times a day, thus disrupting production.
8. Complainant absented herself from her work position not as a result of physical needs resulting from her state of health as she claimed, but in order to take cigarette breaks.
9. Complainant refused to perform work assigned her.
10. Complainant on several occasions was insubordinate and insulting to her supervisors, used profanity toward them, and refused orders.
11. Complainant was discharged by Respondent on November 4, 1976 for insubordination, failure and refusal to perform assigned work, leaving her work position without permission or valid reason, and profane and insulting comments to her fellow employees and supervisors. All legitimate non-discriminatory bases for discharge.
12. Respondent has discharged several other employees who were not members of minority groups for insubordination, refusal to perform work, and insulting or using profanity toward other employees or supervisors.
13. Respondent employs numbers of black and other minorities at its plant in Madison that significantly exceed the proportions of those minority groups in the Madison Standard Metropolitan Statistical Area.

RECOMMENDED CONCLUSIONS OF LAW

1. Complainant is a person as defined by Madison General Ordinances s 3 .23(2)(a).
2. Respondent is a person as defined by Madison General Ordinances s 3.23 (2)(a).
3. Respondent's discharge of Complainant was for valid non-discriminatory reasons.
4. Complainant failed to show that Respondent's reasons for discharge were pretexts for discrimination.
5. Therefore, this case should be dismissed.

RECOMMENDED ORDER

For the foregoing reasons, EOC Case #2323 is hereby dismissed.

Dated at Madison, Wisconsin this 13 day of October, 1977.

Robert L. Greene, Jr.
Hearing Examiner

cc: Timothy C. Sweeney, Attorney for Respondent

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Barbara Hardin 101 East Mifflin Street Madison, Wisconsin 53703 Complainant vs. Swis Colony, Inc. 1225 East Washington Avenue Madison, Wisconsin 53703 Respondent	MEMORANDUM ACCOMPANYING RECOMMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER EOC Case 2323

This case involves an individual discharged allegedly on the basis of Complainant's race. For the reasons set forth below the Examiner recommends that the complaint be dismissed.

The procedural format and basic substantive elements of cases of individual discrimination was set down by the United States Supreme Court in McDonnell Douglas Corporation vs. Green 411 U.S. 792, 5 FEP Cases 965 (1973). In that case, the Court was confronted with a case involving a charge that McDonnell Douglas had discriminatorily refused to hire complainant Green.

The Court accepted the case specifically in order to clarify the standards governing the disposition of an action challenging employment discrimination." McDonnell Douglas supra at 967. Its opinion allocated burdens of proof in cases involving alleged refusal to hire an individual because of that individual's race.

The Court required that the Complainant, in order to meet the initial burden of establishing a prima facie case, must show that, "(i) he belongs to a racial minority; (ii) that he applied, and was qualified for a job for which the employer was seeking applicants; (iii) that despite his qualifications he was rejected; and (iv) that after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." McDonnell Douglas supra at 969.

In a footnote the Court made it clear that the particular elements of the formula enunciated above were adapted to the facts of the case before it, and lower courts would need to develop analogous standards that were applicable to different fact situations.

On April 19, 1977, the 7th Circuit Court of Appeals issued an opinion in Flowers vs. Crouch Walker Corp. 14 FEP Cases 1265 which modified the McDonnell Douglas standard to apply to cases involving discharge. The Court accepted proof of the following points as a prima facie case "(1) that the plaintiff was a member of a racial minority; (2) that he was qualified for the job he was performing; (3) that he was satisfying the normal requirements in his work; (4) that he was discharged; and (5) that after his discharge the employer assigned white employees to perform the same work." Flowers supra at 1268

Upon completion of a complainant's case containing some credible evidence of each of these points, the burden or proceeding passes to the respondent. If the respondent can show a "legitimate nondiscriminatory reason for the discharge" (Flowers vs. Crouch Walker Corp. 14 FEP at 1269, McDonnel Douglas vs. Green 5 FEP at 969) the respondent is entitled to prevail, unless the complainant can show that respondent's non-discriminatory reason was mere pretext for prohibited discrimination. McDonell Douglas vs. Green 5 FEP 970

Though Complainant put in some evidence that could be construed to imply the minimal elements of a prima facie case,[1] Respondent's evidence clearly proved that Complainant was not satisfactorily performing her job, that she was insubordinate, dishonest, and disruptive. Respondent further proved that white employees had been fired for lesser offenses similar to those of Complainant. Complainant did not challenge any of this testimony or offer any evidence to rebutt it.

It is a settled matter of law that employees may be discharged for insubordination and aggressive conduct. Jack vs. American Linen Supply Co. USCA 5th 1974, 8 EPD para. 9583, 8 FEP 658; Martin vs. Sterling Drug 8 EPD para. 9517, USDC SDNY, 8 FEP 952 (1974); Watkins vs. Scott Paper Co. 6 FEP 543, USDC Ala. 1973; and poor work performance Wilson vs. Mead Corp. USDC Ala. 1973, 9 FEP 1372; Alexander vs. Gardner Denver Co. USDC Colo. 1974, 8 FEP 1153, and for insubordination, unsatisfactory work, in combination with abuse of rest periods Thurston vs. General Electric Corp. 8 FEP 9696; Watkins vs. Scott Paper supra or any other reason "except discrimination or because of practices made unlawful under Title VII" Barnes vs. Lerner Shops of Texas, Inc. USGS SD Tex. 1971, 3 FEP para. 8158; 3 FEP 240

Thus, Respondent met its burden of proving a legitimate non-discriminatory reason for discharge. Complainant did not challenge any of this evidence.

Nor did Complainant offer any argument or evidence that the Respondent's stated reasons for discharging her were a pretext for unlawful discrimination.

Consequently, the Examiner is compelled to conclude that Complainant did not make a case of prohibited discrimination, and the complaint must be dismissed.

Dated at Madison, Wisconsin this 13 day of October, 1977.

Robert L. Greene, Jr.
Hearing Examiner

cc: Timothy C. Sweeney, Attorney for Respondent

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[1]Respondent's motion to dismiss at the end of Complainant's case case was based on an asserted failure of Complainant to present credible evidence to support a prima facie case since her own testimony had been impeached. Apparently the bases for this impeachment are (1) that Complainant had been convicted or prostitution and (2) that Complainant had denied committing the act of prostitution for which she was convicted. Under the Wisconsin Rules of Evidence, evidence of prior criminal convictions may be used to impeach a witness's testimony. However, such evidence does not necessarily impeach a witness. Wis Stat 906.09 Barner vs. Stale 55 W.2d 460 see also Federal Advisory Committee Note.

Since prostitution is neither a felony (Wis Stat. s. 944.30) nor a crime relating to veracity, it would not necessarily be sufficient to impeach, or even as a matter of law, be admissable under the rules of evidence.

The standards for evidence in administrative proceedings being more lax than the Rules of Evidence (Wis. Stat, s. 227.08) the Examiner chose not to allow the prostitution conviction to discredit all of the Complainant's testimony.

As to whether or not the Complainant lied about acts of prostitution committed with a specific person, or during certain time periods; Respondent did not attempt to enter into the record any evidence contradicting Complainant's testimony. (Such as the fact that Complainant was convicted for an act of prostitution with Officer Travers) Thus the foundation is insufficient to permit impeachment of Complainant's testimony on the basis of perjury.

The remaining portion of Respondent's motion was that Complainant had failed to place into the record evidence sufficient to support inferences of all of the elements necessary to make a prima facie case as outlined in Flowers, or perhaps that portion of that case had been rebutted by Complainant herself, under cross examination. The Examiner believes that sufficient evidence was presented to make out the rather minimal elements of a prima facie case, and that the doubts raised by Complainant's testimony under cross examination did not justify a dismissal under the principles enunciated in Flowers vs. Crouch Walker.