Beckman #2

VOLUNTARY ARBITRATION PROCEEDINGS
Termination Appeal Procedure
David L. Beckman, Arbitrator

In the Matter of Arbitration between:

EMPLOYER, INC. EMPLOYER

OPINION AND AWARD

EMPLOYEE EMPLOYEE

Date of Assignment
August 19, 1997
Dates of Hearings
January 13, 1998
February 10, 1998
April 15, 1998
Receipt of Transcript
May 6, 1998
Receipt of Briefs
August 4, 1998
Date of Decision
September 27, 1998

ISSUES

(1) Does the evidence establish just cause for the termination of the employment relationship between the Employer and Employee on or about May 29, 19977?

(2) Did the Employer unlawfully discriminate against Employee on the basis of his race (African American) in discharging him?

(3) Is Employee entitled to earned vacation pay under the Employer policy or under State A law?

RELEVANT TERMINATION APPEAL PROVISIONS

Section L

Arbitrator's Authority

The arbitrator's authority shall be limited to deciding claims arising out of or relating to the associate's termination from employment The arbitrator shall have the authority to determine whether the termination was lawful under applicable federal, state and local law and to determine whether the Employer had just cause for termination

The arbitrator must consider and rule on every issue within the scope of the arbitrator's authority which was specified on the Termination Appeal Form or which was raised at the arbitration hearing and which was not resolved prior to arbitration

In reaching a decision, the arbitrator shall interpret, apply and be bound by any applicable Employer handbooks, rules, policies and procedures and by applicable federal, state or local law The arbitrator shall have no authority, however, to add to, detract from, change, amend or modify any law, handbook, rule, policy or procedure in any respect Nor shall the arbitrator have authority to consider or decide any matters which are the sole responsibility of the Employer in the management and conduct of its business

If the arbitrator finds that the associate violated any lawful Employer rule, policy or procedure established by the Employer as just cause for termination, and finds that the associate was terminated for that violation, the associate's termination must be upheld and the arbitrator shall have no authority to reduce the termination to some lesser action.

Section M

Relief

If the arbitrator finds that the associate was unlawfully or unjustly terminated, the arbitrator may grant any remedy or relief that a court of competent jurisdiction could grant. However, in no event shall the arbitrator award relief greater than that sought by the associate.

If the arbitrator awards back pay, the arbitrator shall deduct from the award[ed] the associate's interim earnings, any other sums paid in lieu of employment during the period after discharge, including but not limited to unemployment compensation payments, and any amount attributable to the associate's failure to mitigate the damages.

If the arbitrator orders reinstatement, the Employer shall have the option, within fourteen (14) days of receipt of the award, to request that the arbitrator make a monetary award in lieu of reinstatement. If the Employer makes such a request, the arbitrator shall make a monetary award which the Employer, at its discretion, may pay in lieu reinstatement. The arbitration hearing shall be reopened for additional proofs on this issue if either party so requests.

Section N

Arbitrator's Award

The arbitrator shall submit to the parties a written award signed by the arbitrator The award shall specify the relief awarded, if any, and the elements and basis for any monetary award The award shall be accompanied by a written opinion signed by the arbitrator which shall include findings of fact and, where appropriate, conclusions of law.

The arbitrator's award shall be final and binding and a judgment may be entered on the award by any circuit court or other court of competent jurisdiction.

EMPLOYER POSITION

The Employer had just cause to discharge Mr. Employee because of his poor judgment. He left the store with the deliberate intention of participating in an illegal drag race with several of his subordinates. Whether he was on break or lunch is immaterial. He abandoned his post and his responsibilities and exposed these employees and others to the inherent dangers of drag racing and the Employer to potential liability. The Employer should be

able to expect more from the manager in charge of its multi-million dollar store Mr. Employee remains unrepentant, claiming that the Employer should not be concerned about what he does on his "own time" and off the Employer property. This attitude alone evidences his unsuitability to manage the Employer's affairs.

Mr. Employee failed to establish that the discharge was because of his race. He alleges a pattern and practice of discrimination, including. (1) alleged discriminatory treatment when he worked in the City A store; (2) alleged under representation of black managers and employees at the City B store, (3) Mr. Person 1's failure to act on his recommendations to promote black team members, (4) Mr. Person 1's failure to promote Person 2 to the meat manager position, and (5) alleged disparate treatment of blacks and whites who violated the Employer's language policy. Mr. Employee also argued that he was treated differently from Person 3 and Person 4. A close examination of the evidence on each of these claims shows no pattern or practice of discrimination. Mr. Employee was not a victim of race discrimination; he was a victim of his own poor judgment.

Mr. Employee is not entitled to vacation pay under Employer policy or State A law. He claims two weeks of earned vacation pay and liquidated damages up to double the amount under State A law. Under State A law he is not entitled to any vacation pay, because he did not meet the conditions of the Employer's published policy. Although State A law recognizes that an employee is generally entitled to pay for unused vacation days, that is not the case where the employer has an express policy dictating otherwise. The Employer policy authorizes payment of unused vacation and personal days on the condition that the employee is not terminated for violation of Employer policy or for conduct which demonstrates a disregard for the Employer interests. Mr. Employee's illegal drag race

evidenced a blatant disregard for the interests of the Employer, its customers and its employees. Accordingly, we ask that the termination be upheld, and the appeal denied.

EMPLOYEE POSITION

Mr. Employee was wrongfully terminated, and the employer engaged in race discrimination, as well as violating the State A Wage Statute. The only limitation that can be placed on an entitlement to earned vacation pay is by agreement or by published policy. There was no agreement here and the policy relied upon was hidden. Mr. Employee was not aware of the alleged policy. Mr. Person 5 admitted that the policy was not written Mr. Employee asked Person 5 whether he should use his vacation pending the investigation, and Person 5 told him to keep working and failed to mention that Employee would lose vacation pay upon termination.

Title VII of the Civil Rights Act of 1964 prohibits discharge on account of race, and allows for proof of discriminatory intent by means of an indirect burden shifting method See *McDonnell-Douglas Corp. v. Green, 411 U S 792 (1973)*. Under the method approved by the Court, an employee establishes a prima facie case of racial discrimination by a preponderance of the evidence, thereby creating a rebuttable presumption of discrimination, which shifts the burden to the employer "to articulate some legitimate, non-discriminatory reason" for the employee's treatment. If the Employer does so, then the employee must establish that such reason is nothing more than mere pretext for the true motivation of racial discrimination.

The prima facie case is met first by the showing that Employee is black, and therefore a member of a protected class. Second, Employee performed his job as co-night store director well enough to meet and exceed Employer's legitimate expectations. He had an excellent work record with no previous written discipline. Store Director Person 5 checked the re-employ box on the paper work terminating Employee, and he testified that the option of demoting Employee

should have been pursued by Employer. Employee continued with his normal duties as night store director during the two-week investigation prior to the termination. Employee was discharged despite his job performance, and the replacement for him was a white individual. With such a prima facie case, the burden shifts to Employer to rebut the presumption of racial discrimination. Employer bases its entire reason for discharge on Employee's participation in, and alleged authorization of, a drag race that involved himself and two white team members. We contend that the drag race is a mere pretext to the true motivation of discharging Employee based on the color of his skin. Not only was he treated more harshly than the white employees involved in the drag race, but Employer has a history of treating black employees more harshly than white employees similarly situated. Even Store Director Person 5 admitted that Employee should have been offered lesser discipline. Employees may leave Employer property while on break, and do what they want Employer has no policy that prohibits employees from leaving Employer while on break Employee was on his lunch break when he left the Employer property for the drag race Employee did not authorize Person 3 or Person 4 to leave Employer property while on Employer time In fact, Person 3 and Person 4 lied to Employee about being on break when they left the Employer property for the drag race Employee was not the instigator of the drag race, but participated only after Person 3 incessantly hounded him to the point Employee just wanted to shut him up out of frustration Employer's attempt to place all blame for the drag race on Employee is an unbelievable basis for termination. The true reason for termination was not the drag race Employer admits it should not have terminated Employee, but should have given some lesser form of discipline One mistake should not have resulted in discharge. The Employer has a discretionary standard for violation of the safety policy, that is, up to and including termination. The facts show that

when disciplinary action was discretionary, blacks got fired and the whites did not.

The lesser discipline imposed on Person 3 and Person 4 is based solely on the difference in the color of their skin. The disparate treatment of black employees is evident in (1) the lack of promotion of black employees, (2) the treatment to which black managers (Person 6 and Person 7) were subject, (3) the discipline given to black employees versus white employees, and (4) the difference in the enforcement of the language policy. We submit that Employer's articulated reasons for the disparate treatment of blacks are inconsistent and not believable. Finally, the statistical evidence demonstrates that Employer does not have an adequate representation of the black community in its management positions Employer has 600 employees with 40 to 50 managers in each of the three City B stores. Since the time of Employee's termination, Employer has employed only one black manager out of 120-150 positions in City B Employer offered no explanation for this. Given all of this evidence, we contend that Employee has successfully rebutted Employer's reason for termination as pretext, and should prevail on his race discrimination claim.

Employer did not establish just cause for termination. Terminating Employee for his participation in a drag race, which occurred while he was on his own time and off Employer property is not a just cause reason.

Employee should prevail in this case He should get $2,680 on his wage claim, plus attorney fees and costs, as well as lost wages and benefits up until the day of his new employment, plus a reasonable amount for emotional distress Employee will submit a fee petition of costs incurred within ten (10) days of the decision in his favor.

INTRODUCTION

The Termination Appeal Procedure which Employer, Inc (herein referred to as Employer) makes available to a managerial employee (herein referred to as Appellant or Employee) who has been discharged contains provisions which allow for final and binding arbitration Under the Termination Appeal Procedure, David L Beckman, Louisville, Kentucky was selected as Arbitrator to decide the issues set forth on page 2 hereof. The hearings were held at the Some Inn, City B, State A on the dates indicated above.

Opportunity was given to each party to present evidence, to examine and cross examine witnesses, to state positions and make arguments with respect to the evidence Following the hearing, both parties filed written briefs of their respective positions and arguments.

The evidence is in dispute Disputes unresolved in the "Findings of Fact" are resolved in the Opinion which contains additional findings of fact.

FINDINGS OF FACT

On May 29, 1997, Appellant, Employee, the night store director at store 124 in City B, State A, was discharged from Employer, Inc Employee had been hired in November 1994 as a lines manager-in-training at store 120 in City A, State A. He was promoted in October 1995 to night store director at store 124 in City B. He received regular raises during the period of his employment Employer stated that the discharge was for drag racing behind the store with several employees during the shift on May 19, 1997. As night store director, Mr. Employee received a salary of $670.00 per week.

On September 6, 1997, Employee became employed by Mart A as an assistant manager at $820.00 per week. Before his termination on May 29, 1997, Mr. Employee had to his credit ten earned vacation days.

The position of night store director reports directly to the store director Employee was the top manager in charge of the store during the third shift, from approximately 11 00 p.m. to 7.00 a.m. The next-in-command to Employee was Person 8 who held the title of night store co-director. As such, Person 8 was in charge of the store when Mr. Employee was not on duty. When the two night store co-directors worked together, Mr. Employee had the final decision-making authority.

The night store director is in charge of a 230,000 square foot retail "hypermarket" which includes a full service supermarket, a fashion area, a hardgoods area, three restaurant areas, a garden center, photo center, a pharmacy and millions of dollars of inventory and equipment. The third shift has the responsibility of getting the store set up for the next day by performing the overnight stocking and cleaning. The night store director is responsible for dealing with emergencies, customer complaints, and personnel issues such as call-offs and discipline The night store director supervises four or five managers The total number of employees on the third shift ranges between 50 and 75. The store is open to customers 24 hours per day, seven days a week. The typical third shift will have from 200 to 300 customers before midnight, and fewer thereafter.

The Drag Racing Incident

Person 3, a third shift grocery stocker, owned a former police car He felt it was a fast car and he continually told Employee that his car was faster than Employee's. Employee drove a

Corvette. On the night of May 18, 1997, Person 3 and co-worker, Person 4, went to the break room for the regular 4 00 a.m. break. Toward the end of the break, Person 3 saw Employee in the break room and asked when they were going to race Employee responded that he was tired of hearing it, and accepted the challenge to race.

Employee, Person 3, Person 4 and Person 9, an off-duty cashier, went to Road A, the public street directly behind the store. Person 4 was placed at a designated finish line, and Person 9 was placed at the starting line to start the race. When Person 9 signaled the start of the race, both Employee and Person 3 took off in their vehicles, side-by-side, toward the north end where Person 4 awaited to declare a winner. Employee beat Person 3 by almost half the distance of the race course. After the race, Employee, Person 3 and Person 4 returned to the store to continue working the third shift.

The Investigation

Person 8 reported the incident to store detective, Person 10. Ms Person 10 called loss prevention manager, Person 11, for guidance on what to do Person 11 told her to start getting statements from all of the participants and witnesses. At about 7 00 or 8 00 a.m., Ms Person 11 called store director Person 5 at home. Shortly thereafter, Mr. Employee called Mr. Person 5 to describe his involvement in the race, and Employee also reported that he felt that he had made a mistake in engaging in the race. Person 5 took charge of the ensuing investigation and he personally interviewed Employee, Person 8, Person 3 and Person 4 Mr. Employee continued to work during the course of the investigation.

Store director Person 5 consulted with the regional corporate headquarters in City C who supplied a team relations specialist, Person 12, to take direct involvement in the matter. After reviewing the investigative reports, and after engaging in discussions with store director Person

5, district director, Person 13, and her supervisor, Person 14, Person 12 recommended that Employee be discharged. Person 5 concurred with the recommendation and on May 29, 1997 Person 5 met with Employee and advised him that he was being terminated for illegal drag racing during his scheduled shift in violation of the Employer's safety policy, and using poor judgment and negligence in performing his job.

Person 3 was given a written warning and three days off for misuse of Employer time and violation of the safety policy. Person 4 was given a written warning and five days off for misuse of Employer time, violation of the safety policy and violation of the honesty policy. The Employer determined that Person 4 had initially lied about whether he was on the clock during the race. Mr. Person 8 was counseled about how to handle a similar situation in the future.

Person 9 was not disciplined, because she had punched out for the day, and was no longer working when she acted as the starter of the race.

The Evidence as to Racial Discrimination

The evidence adduced on the issue of racial discrimination is in dispute. The evidence involves allegations of improprieties at the City A store, as well as incidents and matters which occurred at the City B Store. The evidence may be summarized as follows.

The City A Store—Store 120

From November 1994 to October 1995, Employee worked as a lines manager in training at Store 120 in City A, State A. The store director there was Person 15. His immediate supervisor was Brenda Person 16, the fashion area lines manage. Employee was the only black manager or trainee in the store. Employee testified that Ms Person 16 was rude to him, and concluded that her actions toward him were dictated by her dislike of black people. Employee testified that he reported the situation to Person 15, but Person 15 did not do anything about it.

Instead, Employee claimed that Person 15 retaliated by assigning him to work at other stores and by reassigning him to work in the hardlines area under another manager.

Person 15 disputed Employee's claim that Employee was the only black manager or trainee at Store 120. He identified Person 17, receiving and marketing room team leader, Person 18, video team leader, Person 19, toy team leader, Person 20, fashion area team leader, Person 7, night store director, and Person 21, trainee, as black management employees who all worked at the store at the same time as Employee. He stated that Employee never made any race discrimination complaints against Ms. Person 16. He did acknowledge, though, that Employee questioned some aspects of his training. He said that Ms Person 16 was very detail oriented and meticulous and that she could be brusque or gruff. In this regard, Employee's wife, who also worked at the City A Store, described Ms. Person 16 as a rude person to just about everyone except her closest friends. Person 15 stated that he never saw any evidence of racial bias or discrimination on the part of Ms Person 16. He noted that she promoted four black team members to management positions, and had at least five black managers and twenty to twenty-five black team members reporting to her. None of those employees had ever made a discrimination complaint against Ms. Person 16.

Person 15 testified that the temporary assignments of Mr. Employee to other stores were at the invitation of District Director Person 13 and were designed to improve conditions at the other stores Person 15 claimed that the assignments were invaluable training experience.

The Statistical Evidence of the Racial Makeup of the City B Stores

Employee testified that while he was the night store director at the City B Employer Store on Road A, there were only four black team leaders at all three City B stores Person 7, Person 6 and Employee are three of the four, Person 7 and Employee were terminated and

Person 6 was demoted. All were replaced by white employees. The 1990 census of the City B black population was 16.7%. The three Employer stores in City B each have about 600 employees, and each have about 40 to 50 managers. Of these total managers, Employee asserts that there is only one black person at this time Person 1, who was store director at Store 124 for most of the time Mr. Employee worked there, testified that the corporate office set EEO hiring goals for each store. The goal for Store 124 was 12 5%, but that figure included all minorities, not just blacks. He noted that during the time he was there, the percentage of minority employees was consistently between 17% and 18% Person 1 testified that many of the employees at Store 124 in the City B area come from County A, where the store is located, as well as from many of the towns and cities in the surrounding counties of County B, County C, County D and County E. Person 1 was of the view that the appropriate statistics by which to measure demographic employment profiles should include those areas. Employee, on the other hand, argued that such evidence was irrelevant, since it does not show how the county and the City B Metropolitan Statistical Area figures reflect the labor force and racial breakdown for any of the Employer stores in City B, or how many employees were hired by Employer who live in City B or in the surrounding counties.

Employee's Recommendations of Person 22 and Person 23

Mr. Employee recommended black team members, Person 22 and Person 23, for management training positions He made the recommendations to Pat Person 1, Store Director Employee said they were never interviewed, and that he was never informed as to the reasons for the failure to interview and consider them.

Employer responded with the following evidence Service Area Manager Person 24 was the supervisor of Ms Person 22. He testified that she never indicated that she was interested in

becoming a manager trainee, and never turned in a job interest resume Person 22 had an attendance and tardiness record which was unsatisfactory to the Employer. She had been disciplined for incidents involving no-call/no-show and cash control. She had limited work availability in that she could not work later than 2 p m. Person 24 testified that such facts stood in the way of him recommending her for promotion to manager trainee Person 1 testified that he did not recall Mr. Employee recommending Ms Person 22 for a trainee position, but had he done so, he would have asked Mr. Person 24 for input before doing any interviews. He said that he would not have interviewed her, or promoted her, because of her attendance and tardiness problems.

Mr. Person 1 noted that Person 23 was described by Mr. Employee as a temporary employee who worked for Employer during holiday seasons. Person 1 testified that it would be unlikely he would interview or select a seasonal employee for a management trainee position without a longer period to evaluate performance. It had been claimed that a white employee from frozen foods was interviewed for a team leader position and was eventually given a frozen food order writer position. Person 1 identified that white employee as Person 25, a grocery stocker. Person 25 had applied for a trainee position during "open interviews" at the store. This was described as a process in which for a period of several days lines managers and employment specialists from City D interviewed anyone who wanted to apply for a trainee position. There was no evidence that Person 22 and Person 23 had availed themselves of this opportunity Person 25 applied but was not selected The order writer position is not a management position. Rather, it is a job assignment As it turned out, Person 25 did not do well in that position, and was reassigned.

The Person 2 Matter

Mr. Employee testified that after meat manager, Person 7 was terminated the Employer promoted a white meat cutter named Person 26 to that position rather than manager trainee Person 2, who was black and who was in the department Employee thought the denial was because of Person 2's race.

Mr. Person 1 explained that Person 2 had already been transferred to the seafood department as a trainee, when Person 7 was terminated Person 2 had been selected to be the seafood manager at the City E store, which was to open in the future Person 2 did not apply for the meat manager position when it was posted following Person 7's termination. The person selected for the meat manager position had a background of nine years of experience as meat manager, assistant meat manager and deli manager prior to going to work at Employer.

The Language Policy—Person 24, Person 27 and Person 28

Employee testified that in his opinion black employees were disciplined more harshly than white employees when the Employer applied its language policy. He made an issue of the case involving Person 28, a black employee, who was terminated for violating the language policy, by noting that white managers, Person 24 and Person 27 were not terminated. He concluded that the Employer engaged in a pattern of treating black and white employees differently.

The Person 24 Incident

Employee claimed that service manager Person 24 violated the language policy and received no discipline. He testified that he called Mr. Person 24 at home one night regarding a problem in the service area, and the next day Person 24 left him a voice mail message in which Person 24 threatened to kick Employee's ass and slap him if he called him again in the middle of the night. Employee said he reported the matter to store director Tracey Person 5 who did

nothing about it.

Person 24 testified that over a two-year period Mr. Employee had called him as many as 20 or 30 times between midnight and 6 00 a m. usually about sick calls in the service area Person 24 said he made suggestions to Employee of things he could do which would obviate the need to call him in the middle of the night. After the calls continued, Person 24 left the voice mail message for Mr.. Employee. Person 24 testified that his wife was pregnant and he was upset because the calls were disturbing her sleep Person 24 said that Store Director Person 5 called him in to his office to explain the voice mail message. After hearing what Person 24 had to say, Person 5 directed Person 24 to talk with Mr. Employee and apologize for his conduct and offer to work out the problem. Employee acknowledged that Person 24 followed out the directive Person 24 said they agreed that Employee would work harder to solve the service area problems before calling Person 24, and Person 24 would address any future concerns in a professional manner Store Director Person 5 testified that under the circumstances, he felt that written discipline was not warranted.

The Person 27 Incident

Employee testified that during a lines manager meeting, Person 27 stated that they would not have so much paperwork if the store secretary would get off her "flicking ass " The store secretary, Person 29, was not present at the time the statement was made, but other employees were present One of the persons present was Store Director, Person 1, who testified that Person 27 used the term "fat ass" not "fucking ass". In a deposition in a prior case, Mr. Person 1 testified that he heard "fucking ass" but corrected himself during the same deposition to state that he heard "fat ass." The evidence established that Store Director Person 1 issued a written reprimand to manager Person 27 for violation of the language policy.

The Person 28 Incident

Employee brought up the case of Person 28, a black employee, who was discharged for violating the language policy Person 28, a probationary third shift building services employee, told another employee on the sales floor "I'll kick your fucking ass".

Employee said he suspended Person 28 for violation of the language policy and the following day called Person 12 about the incident and turned in paperwork. Three days later Store Director Person 1 told Employee to discharge Person 28.

Person 12 made a search of her files, but found nothing to substantiate Employee's account. The final change of status form on Mr. Person 28 indicated that in addition to using profanity, Person 28 had started a fight and threatened a manager. When these facts were provided to Mr. Employee on cross examination, he said that he called Mr. Person 1 the same night of the incident and was told to terminate Person 28 Pat Person 1 disputed this account He had no recall of Mr. Employee calling him at home about the incident, even though he did remember the incident But assuming that the call was made, he said that he would not have told Mr. Employee to discharge Person 28. He said he would have told him to suspend Person 28, so the matter could be properly investigated and reviewed.

The alleged Racial Bias of Person 1

Employee concluded from all of the incidents involving Store Director Pat Person 1 that Person 1 was racially biased in the management decisions he either made or failed to make, such as, the matters involving Person 22, Person 23, Person 2 and employee Person 28. To counter this, the Employer presented testimony from Person 1 that he had hired or promoted at least four black employees to trainee positions Person 30, Person 6, Employee, and one other person whose name Person 1 could not recall Person 1 said that he discharged Person 31, who was

white, for using a racially derogatory term to refer to manager Person 7. In a deposition in the Person 7 arbitration case, Employee testified that he worked for Mr.. Person 1 for about two years, and that he did not feel that Mr. Person 1 harbored racial bias. In explaining this testimony in the instant case, Mr. Employee said that he meant that Mr. Person 1 was not biased toward him, only other blacks.

The Claim of Disparate Treatment of Employee

Employee felt that the most telling incident of blacks being treated more harshly than whites is the very discipline he received (termination) when compared to the shorts suspensions issued to Person 3 and Person 4 He asserted he was on his own time and did not violate any policies, but Person 3 and Person 4 had misused Employer time, violated the safety policy, and participated in the drag race. His counsel also argued that the others committed time card fraud which the Employer ignored. The motivation for all of this difference in treatment, Employee believed, was that he is black and they are white.

Employer countered this evidence, opinion and argument by arguing that Employee was not similarly situated to the other two employees. Employee was a manager, and they were hourly employees Employee had supervisory authority over the other two, who were subordinates. Both Person 3 and Person 4 testified that their participation in the drag race was influenced by the fact that since Mr. Employee was with them, they could not get in trouble. The evidence established that Employer discharged white managers for permitting employees to make prank medical emergency calls over the intercom, and for getting in an altercation with a guest at the store and then following the guest off the Employer property to continue the altercation.

Mr. Employee was of the view that the Employer was not going to discipline Person 3

and Person 4 at all until he complained about disparate treatment. He based his view, at least in part, on the fact that he called Person 32 on June 2, 1997, the Monday after his termination, and complained that Person 3 and Person 4 had not been disciplined Mr. Person 32 was in charge of the Employer's Termination Appeal Procedure. It is part of his job as a human resources manager to investigate and answer appeals Employee felt that Person 32 saw to it that discipline was issued thereafter.

The Employer countered Employee's theory with testimony from Person 12 who testified that she and Store Director Person 5 discussed appropriate discipline for Person 3 and Person 4 as early as May 28, the same day they concluded that Mr. Employee should be terminated. Their initial judgment was that both should be given time off and a written warning. The investigation was not complete, however, because she felt that Person 4 should be confronted with his apparent dishonesty about whether he was on the clock at the time of the drag race. Further interviews were discussed and since Person 3 was off work on May 28, 29, and 30, Mr. Person 5 did not interview him until May 31 Person 4 was off until Monday, June 2 Person 5 interviewed him on June 3. That week Person 12 was on vacation, and her supervisor Person 14 was briefed on the follow-up needed with Mr.. Person 5 during the first week in June Person 14 discussed the matter with Person 5 and the two agreed that Person 3 should receive a written warning for misuse of Employer time and violation of the safety policy, together with three days off without pay. They also agreed that Person 4 should receive a written warning for misuse of Employer time, violation of the safety policy, and violation of the honesty policy with five days off without pay. On Saturday, June 7, Person 5 instructed the grocery team leader, Person 33, to issue the discipline as soon as possible. Person 33 gave Mr. Person 4 his discipline on Monday, June 9. The discipline to Person 3 is undated. Person 33 testified that he gave it to him on June

11, two days after he met with Person 4. He said the two suspensions were not served concurrently, because he did not want to be short two people on the same shift.

Mr. Person 32 disputed the claim of Mr. Employee that they talked on June 2 His procedures and notes showed that Employee did not contact him until June 11, when Mr. Employee left a message for him that he had "new" information He claimed that Person 3 and Person 4 had been disciplined prior to his receipt on June 13 of Mr.. Employee's appeal and attached letter claiming to the contrary.

State A Wage Statute

Employee testified that he was unaware of a Employer policy that an employee fired for. Just cause loses earned vacation pay and personal pay days The actual policy is not in the employee handbook, but according to Person 12, it is contained in a policy procedure manual which is kept in the store director's office She also said the policy is covered with managers at training sessions which all new managers are required to attend. She noted that such a session was held on June 8, 1996 and Mr. Employee was present with then Store Director, Person 1. The policy is published "online" in Employer's computer system, which managers and employees are taught to access Store Director Person 5 testified on cross examination that if the policy was not in the employee handbook, it must be an unwritten policy that is not posted In any event, had Employee not been terminated, he would have been entitled to two weeks of vacation Employee worked for eleven days during the investigation pending his termination. He testified that he could have taken vacation time off during that period Employee said he asked Person 5 if he should take his vacation and Person 5 discouraged him, making no mention of the fact that he would lose the pay if he was terminated for cause.

OPINION

As a matter of general procedure, the burden of proving just cause for discharge is on the Employer, and the burden of proving unlawful discrimination on account of race is on the employee Federal law clarifies the process.

Title VII of the Civil Rights Act of 1964 prohibits an employer from discharging an employee because of the employee's race. See 42 U S C Section 2000e-2 (a) (1) Appellant Employee relies on the indirect, burden shifting approach approved in *McDonnell-Douglas Corp. v. Green*, 411 U S. 792 (1973) In following that approach, it is clear that Employee is a member of a protected class. He is African American It is also clear that Employee, prior to the incident in this case, was doing his work as night store director well enough to meet the employer's legitimate expectations. Despite his prior work performance, he was discharged. He was replaced by a white employee. Under *McDonnell-Douglas*, supra, the inquiry required to resolve this case must concern itself with determining first of all whether the Employer has established a legitimate, nondiscriminatory reason for the discharge of Employee, and if so, whether Mr. Employee has established that the reason is nothing more than mere pretext for the true motivation of racial discrimination. The wage claim of the Appellant is independent of the above, and will be addressed separately.

The Employer's Articulated Reason for Discharge

After evaluating the evidence in the light of the arguments of both counsel, I have concluded that participating in an illegal drag race with subordinates during the course of a scheduled shift is a legitimate reason for questioning the judgment of a night store director and that the determination to terminate the employment relationship because of the demonstrated poor judgment, considering all of the circumstances, is a matter which rests within the sound

discretion of the manager of the business The drag race was a violation of State A law See State A Code, Section 9-21-6-1, which classifies drag racing as a Class B misdemeanor, punishable by imprisonment for up to 180 days and a fine up to $1,000 00. Since the drag race occurred at about 4:30 a.m. during the regularly scheduled shift times of 11 to 7, and since the race was on a street next to the property of the store, I am not persuaded that the situation qualifies for treatment as off the premises misconduct.

The store director position is a salaried position. In the structure used by the Employer, a store director serves in a position of more responsibility than managers As night store director, Employee was the highest ranking official at Store 124 in the early morning of May 19, 1997. By drag racing with a subordinate, an hourly employee, in the presence of at least two other hourly employees, he participated in misconduct which not only exposed himself and others to the risk of serious injury or death, but he also exposed his employer to potential liability for his wrongful acts. There was evidence that he drove his vehicle in the wrong lane on a publicly-dedicated street at a speed which he estimated in a casual conversation with a store detective the following day to have approached 90 miles an hour. Another witness testified that he did not think the racers went over 80 miles an hour. But in either event, the speeds were much in excess of the legal limit, and such speeds on a dimly-lighted and wet street were very dangerous.
It is my conclusion that if the issue of racial discrimination were taken out of this case, and if an employer submitted the remaining evidence in support of its position that it had just cause to terminate the employment relationship with a salaried director, the decision would be that the employer acted with just cause, and the discharge decision would be upheld In other words the evidence in this case establishes a legitimate, nondiscriminatory reason for the discharge of Employee on or about May 29, 1997.

Does the Evidence Establish Mere Pretext?

The inquiry must now answer the following question- Does the evidence submitted by the Appellant, Employee, establish that the reason for discharge set forth above is nothing more than mere pretext for the true motivation of racial discrimination?

The arguments advanced by counsel for the Appellant in favor of a finding of pretext are varied A number of incidents have been advanced to support the argued-for premise that Employer has a history of treating black employees differently from white employees. The Appellant asserts that the history, as shown by the incidents, demonstrates the racial discrimination prevalent within Employer's operations. Each of the alleged events making up the history relied upon by the Appellant will be examined below.

The City A Store

Appellant Employee worked at Store 120 in City A for approximately one year before he was promoted to night store director at Store 124 in City B He began his employment with Employer in November 1994 in City A, where he served under Store Director Person 15 and fashion lines manager, Person 16, his immediate supervisor. The evidence concerning Mr. Employee's assertions of racial bias harbored by the two management officials at City A is set forth above. It appears that Ms. Person 16 was rude to Mr. Employee at times, but it also appears that she treated others with the same kind of attitude While Mr. Employee claimed that he was the only black manager at City A, it is likely that he just did not see some of the other black managers whom the evidence shows were on the payroll at City A. According to Store Director Person 15, Mr. Employee never made any race discrimination complaints against Ms Person 16 while he was at the City A store. The concerns he raised were about the training he was receiving He was temporarily assigned to work in other stores during his training. While he

claimed that this was retaliation, the evidence is clear that other managers-in-training were given such assignments as well. I find valid the employer's argument that such assignments were designed to be part of the training experience.

The Racial Statistics Related to the City B Store

The question here is whether blacks were under represented in both management and hourly ranks. The Appellant presented evidence that the 1990 census showed a black population for the City of City B as 16.7%. Employer attacked the statistic as not being relevant inasmuch as Store 124 draws employees from the entire County of Allen was well as from the surrounding counties of County B, County C, County D and County E. Employer also argued that the statistic provided by the Appellant is a population figure, and does not establish the percentage of black persons in the workforce from the relevant area According to the evidence submitted by Employer, blacks comprise 8 7% of the workforce in County A. Other evidence established that Store 124 had about 12% black employees, depending upon the season of the year. Of this figure, there were about 10% managers and manager trainees. According to Employer's evidence, the corporate office set EEO hiring goals for the City B Store of 12 5%. Further, Employer has asserted that the 12.5% figure included all minorities, not just blacks. The former Store Director, Person 1, testified that while he was at the store, the percentage of minority employees was consistently between 17% and 18%, and that the percentage of black employees was 12%.

Given the above evidence, it is clear that the Employer has the structures in place to achieve a racially-balanced workforce. The goals have been achieved in the past, but there has been a fluctuation in the results The low point occurred with Mr. Employee's termination. This suggests that the focus should now be on returning to the achievement of the hiring goals, but I

do not find that there has been systemic racial discrimination.

The Situation involving Person 2

Mr. Employee felt that manager trainee Person 2 was denied the meat manager position on account of his race after a white meat cutter, Person 26, was terminated There was evidence, however, that Mr. Person 2 had already been transferred to the seafood department as a trainee, inasmuch as he was being groomed for the seafood manager position at a City E store about to open. The meat manager position was posted, and Mr. Person 2 did not bid on it. This is consistent with the evidence that he had already accepted a promotion. The person selected for the meat manager position had nine years of experience as a meat manager, and Mr. Person 2 had none. Under all these circumstances, I find that Mr.. Employee's theory that racial discrimination was at work against Mr. Person 2 is without support in the facts.

Enforcement of the Language Policy

The Appellant has claimed that black employees were disciplined more harshly than white employees, and he points to a number of incidents to support his claim The incidents involve the language policy. Mr. Employee testified that Person 28, a black employee, was terminated for violation of the language policy, but white managers, Person 24 and Person 27, were not. The argument is that the disparate treatment afforded these employees proves that Employer was racially motivated in an improper way.

Mr. Person 24 lashed out at Mr. Employee in an early morning phone call Mr. Employee complained, and the store director investigated and suggested a solution. The two employees followed the suggestion Mr. Person 24 apologized, and Mr. Employee agreed that he would work harder to solve problems prior to making middle-of-the-night phone calls in the future Person 24 also agreed that he would address future concerns in a professional manner I find that

the solution to Person 24's violation of the language policy to have been reasonable under all of the circumstances. The conclusion by the store director that written discipline was not warranted was not an abuse of his discretion as the manager of the store.

Person 27 did receive discipline, however. He was issued a written reprimand. His crude and unquestionably non-professional statement about another employee who was not present was a violation of the language policy. This was his first offense I find the imposed discipline to be a reasonable exercise of management authority and responsibility.

Person 28 was discharged for starting a fight and threatening a manager. In the process of carrying out the improper conduct, he used threatening language. Mr. Employee himself carried out the discharge. There is a dispute over whether he did it on his own or at the direction of Person 12, but in either event the result was proper and distinguishable from the Person 27 and Person 24 incidents Mr. Person 28 threatened a manager and it was proper to deal firmly with that incident. The case is different than the case of Person 27, because there was no threat in that case. With respect to the case of Person 24 and Employee, there is also a distinguishable difference. The latter involved a dispute between director and manager Person 24 probably lashed out, because of his instinct to protect his pregnant wife While the conduct was not proper, it was such that both Employee and Person 24 could craft a working settlement, and go on with their responsibilities. The judgment of the store director to accept the working settlement between the two salaried employees was not unreasonable under all of the circumstances.

The Alleged Bias of Person 1

Mr. Employee accused former Store Director, Person 1, of racial bias for failing to interview or promote Person 22 and Person 23, in addition to his role in the Person 2 and Person 28 cases I find the accusation to lack substance. Mr. Person 1 hired or promoted three named

and one unnamed black employee while he was store director and while Mr. Employee was on his staff. He discharged Person 31, a white employee, for using a racially derogatory term to refer to manager Person 7. Mr. Employee admitted during the Person 7 arbitration hearing that Person 1 did not harbor racial bias. His explanation that he meant that Person 1 was not biased toward him, but he was biased against other blacks does not alter my conclusion that the evidence against Mr. Person 1 is not persuasive.

The Disparate Treatment Claim

Appellant Employee argues that the most telling evidence that black employees are treated more harshly than whites is in the discipline imposed on the various employees for the drag racing incident Mr. Employee (a black) was terminated, but Person 3 and Person 4 (whites) were given short suspensions It is claimed that Mr. Employee was on his own time, and did not violate any policies, and that in addition to the drag race, the other two committed time card fraud.

On this point, the Employer is persuasive in arguing that the cases of the three employees differ in substantial respects, because Mr. Employee was a manager and the other two employees were hourly employees Indeed, the significant reality is that Mr. Employee had direct supervisory authority over the two subordinates. The evidence is clear that Mr. Employee explicitly authorized the leaving-of-the-store-to-drag-race conduct of the other two employees. They probably felt immunized in engaging in such during-the-shift activity. The Employer may well have made allowances for such circumstances in fashioning the suspensions given to Person 3 and Person 4. To conclude that such difference in treatment supports the premise of racial discrimination against Employee would not take adequately into account the reality that upper management may legitimately expect its directors to act with judgment, and that the

failure to exercise judgment in a situation involving hourly employees can be a matter of serious concern.

Mr. Employee asserted that he did not believe upper management was going to take any disciplinary action against Person 3 and Person 4 until he raised the issue of disparate treatment with Person 32. I find that the credible evidence does not support the premise that management originally intended not to take action against the hourly employees. The credible evidence establishes that management was concerned about the appropriate discipline to impose in view of the involvement of the top official at the store, but it appears that early on it was felt that suspensions would be appropriate. There were delays in the serving of the suspensions, partially because the investigation was not complete, and partially because of days off, and the need to schedule the serving of the suspensions at separate times. The Grievant may have thought nothing was happening to the other two, but I find no wrongdoing on management's part in the manner in which the discipline of the hourly employees was handled.

Conclusion

In conclusion, there was not a showing of disparate treatment of Mr. Employee with respect to the drag racing incident Mr. Employee was not similarly situated to Person 3 and Person 4. He was their director, and Employer properly expected more from him in this situation due to the fact the he was the top management official at the store on the night of the incident Mr. Employee staged an illegal drag race and allowed two of his hourly employees whose shifts had not yet ended to participate Mr.. Employee's actions that night caused his discharge. There is no evidence in the record to show that any similarly situated white manager engaged in similarly serious misconduct without being discharged.

After fully reviewing the evidence, I find that the evidence does not preponderate in

favor of a conclusion that the reason for discharge advanced by the Employer is nothing more than a mere pretext for management's true motivation of racial discrimination. Management has a policy against racial discrimination, and the evidence is clear that it is attempting to enforce that policy. The fact that Employee advanced all the way to night store director at the time of the incident in this case is a persuasive indication that the Employer is endeavoring to conduct its business within the policy of the law.

The Alleged Violation of the State A Wage Statute

The State A law is that employees are entitled to unused vacation days, unless the employer has an express policy dictating otherwise See *Osler Institute, Inc. v. Inglert,* 558 N E 2nd 901 (1990) I find that Employer has a Termination Pay policy, the most recent revision of which became effective on February 25, 1996. Section III of the policy provides, in relevant part, as follows:

> Employer people terminated for reasons of misconduct involving violations of Employer rules, policies, procedures or guidelines; or other conduct which is detrimental to or which demonstrates a disregard for guests, Employer people, or Employer interests will not be paid for unused vacation or Personal Paid Days. . [Emphasis added]

The Employer relied upon the above portion of the policy in denying payment for the unused vacation days. I find that the Employer acted within its policy and did not violate State A law in the process.

The Appellant has argued that the policy was hidden, and that Employer should not be allowed to rely upon an unpublished policy to deny that which has been earned by an employee The Appellant's position is not established by the evidence. The evidence is clear that the policy is published in a Policy and Procedure Manual, and that the manual is available in both hardcopy and "online ". Employees have access to the Employer computer and are encouraged

to use it. In addition, the policy is the subject of training sessions. The evidence established that Employee participated in training sessions, and had reason to have actual knowledge of the policy from the content of such training sessions.

I find that Employee had reason to know of the published policy of the Employer with respect to unused vacation pay. The fact that he may not have recalled the policy at the time of the investigation of his case is not relevant to its application. Nor did the store director do anything wrong in encouraging him to continue working while the investigation progressed. At that point, there is reason to believe that both Mr. Employee and the Store Director were hoping that the investigation would not lead to discharge.

In conclusion, Employer does not owe Employee anything on account of the State A wage.

AWARD

The Appeal of Employee is hereby denied.

DAVID L BECKMAN