



STATE OF ILLINOIS  
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
<b>TIMOTHY BRAGG and</b>	)	
<b>TORRE SANDERS,</b>	)	
	)	
Complainants,	)	
	)	
and	)	CHARGE NO: 2000CF2085
	)	2000CF2086
<b>THE YMCA OF METROPOLITAN</b>	)	EEOC NO: 21BA01524
<b>CHICAGO,</b>	)	21BA01525
	)	ALS NOS: S-11543
Respondent.	)	S-11546

**RECOMMENDED ORDER AND DECISION**

These matters are ready for a Recommended Order and Decision pursuant to the Illinois Human Rights Act (775 ILCS 5/1-101 et seq.). A public hearing was held before me in Chicago, Illinois on February 16, 17, 22 and 23, 2005. The parties have filed post-hearing briefs. Accordingly, these matters are ripe for a decision.

**Contentions of the Parties**

In the instant Complaints, Complainants assert that they were the victims of race discrimination when Respondent terminated them from their duty manager/security positions after finding that Complainant Bragg had punched in Complainant Sanders's timecard when Sanders was not on the premises in violation of its timecard policy. Respondent, however, maintains that Complainants cannot establish a *prima facie* case of discrimination. It also submits that Complainants failed to show that the reason for their terminations was a pretext for unlawful discrimination.

**Findings of Fact**

Based on the record in this matter, I make the following findings of fact:

1. On October 3, 1993, Complainant Torre Sanders, an African-American, was hired as a switchboard operator at Respondent's Lawson House, a hotel that provided housing for a transient population. Sanders was subsequently promoted in 1994 to a front desk clerk position.

2. In 1996 Sanders was promoted to a duty manager position working the midnight to 8:30 a.m. shift. At that time the executive director of Lawson House was Bill McAfee. At all times pertinent to the instant Complaint, the duties of a duty manager required, among other things, that Sanders: (a) operate the reception area and the telephone switchboard, (b) prepare reports; (c) maintain immediate access to the building for all staff; and (d) resolve guest problems. The duties also required that Sanders back up the on-duty security officer and to ensure that the security officer conducted building tours on a timely basis.

3. On June 11, 1996, Complainant Timothy Bragg, an African-American, was hired as a part-time security guard by Respondent.

4. On June 19, 1997, Bragg was written up by his supervisor Kathy Elg for failing to properly punch out for his lunch/dinner breaks and for refusing to back up other security officers/front desk switchboard operators when they were scheduled to go on break. The incident pertaining to Bragg's failure to take over for the front desk/switchboard operators was reported by Sanders, and Bragg and Sanders did not speak to each other for a period of eight to twelve months as a result of the incident.

5. On September 12, 1997, Sanders was written up for an incident by Jenefer Ford, an African-American, who was Respondent's operations director. At that time, Ford had received a complaint from members of the "Senior Club" who were upset at Sanders's presence while security was ousting them from Respondent's library. Sanders was instructed by Ford not to accompany security personnel when they were performing their duties.

6. At all times pertinent to these Complaints, Respondent had a written policy that provided that employees who punch other employees' timecards or who fail to punch their own timecards could be subject to discharge. At all times pertinent to these Complaints, both Complainants were aware of this policy.

7. In October of 1997, Ford learned from Bertha Little, an African-American employee, that Maurilio Alvarado (a Hispanic maintenance employee) and Ralph Georgia (a Caucasian maintenance employee) had violated the timecard policy when Georgia punched-in Alvarado's timecard. At the time of Little's report, both Alvarado and Georgia had been warned that a timecard violation could result in termination. Ford investigated the matter and determined that Alvarado and Georgia had driven to work together, and that Georgia had punched in Alvarado's timecard while Alvarado was parking the car and gathering tools. Ford told Alvarado and Georgia, who both admitted the violation, that under no circumstance was an employee to clock in for another employee and referred the matter to Mitch Brozak, the supervisor of both Alvarado and Georgia.

8. In October of 1997, McAfee was ultimately responsible for imposing any discipline on maintenance employees at Lawson House. Neither Alvarado nor Georgia were suspended or terminated as a result of the October 1997 timecard violation.

9. In December of 1997, Timothy Bragg became a full-time security officer. As a full-time security officer Bragg's duties included, among other things: (1) making resident floor checks; (2) notifying proper authorities in cases of disturbances, thefts, property damages or threats; (3) monitoring access to the building; and (4) investigating all complaints and problems arising in the building. Bragg's job duties also required that he back up the switchboard operator during the midnight shift's break.

10. In February of 1999, John Lafley (Caucasian) became executive director of Respondent's Lawson House. At some point after assuming the executive director duties,

Lafley came to the conclusion that McAfee had been too lax in enforcing Respondent's policies, and that he needed to raise the standards of behavior of the Lawson House staff.

11. On December 10, 1999, Sanders received a "final" written warning from Ford regarding an incident in November 24, 1999 in which Sanders found himself in a physical confrontation with two residents. Ford told Sanders that his conduct violated Respondent's "hands off" policy and informed him in the written warning that in the future he was to walk away from confrontations, "call police and appropriate staff" and make appropriate written reports. Sanders believed that his actions were in self-defense and were justified.

12. At some point in 1999 and going into 2000, Lafley began hearing rumors that employees had been violating the timecard policy. In late January, 2000 Lafley conducted a staff meeting that included Bragg and others where the timecard policy was discussed, as well as the rumors of said violations. Sanders was not at the meeting, but was aware of the fact that the timecard policy had been discussed at the meeting.

13. On February 17, 2000, Respondent included a copy of the timecard policy in all of the employees' paychecks.

14. At some point between 12:15 a.m. and 12:30 a.m. on February 25, 2000, Lafley received a telephone call from Alvarado indicating that Sanders had not yet reported to work for his scheduled shift that had started at midnight. Soon thereafter, Lafley called the reception desk where Bragg told him that Sanders was in the building responding to a call from a resident on the 22<sup>nd</sup> floor.

15. When Lafley came to work the next morning, he decided to conduct an investigation given the discrepancy between Alvarado's and Bragg's statements as to Sanders's whereabouts. Lafley formed a Committee consisting of himself, Ford and Gloria Johnson (Caucasian), Respondent's resident director and supervisor of Sanders and Bragg. The purpose of the Committee was to gather statements from various individuals working at the time of the alleged timecard violation and make a factual determination of what had

happened on the previous evening. During this process, the Committee learned that someone had punched in Sanders's timecard at 12:01 a.m.

16. At all times pertinent to the instant Complaints, the first floor of Lawson House contained a front reception desk that was enclosed by glass and near the entryway to the sole access to the building on Chicago Avenue. The timecard machine was located in a small room near the front desk such that anyone in the vestibule area on the first floor could see if someone was in the act of punching in a timecard. Also, the first floor contained three elevators approximately 30 feet away from and within view of the reception desk. The elevators were programmed to return to the 21<sup>st</sup> floor whenever not in use. The resident's lounge was a few feet beyond the elevators at the end of the elevator lobby.

17. Lafley, Ford, and Johnson interviewed Demetrius Whitaker, Carolyn Brown, Sanders and Bragg. Lafley and Ford also interviewed Alvarado and Elizabeth Ross. Whitaker, Brown and Ross are all African-Americans. All witnesses who were employees of Respondent, except Sanders and Bragg, signed written statements attesting to the accuracy of the summaries of their statements.

18. During their interviews both Sanders and Bragg denied having committed any time clock violation. Specifically, Bragg insisted that: (1) he took a phone call from Tinelion (but known as Thelonious by the parties) McArthur at or near midnight complaining about a disturbance on the 22<sup>nd</sup> floor; (2) he saw Whitaker punch in his own timecard and then talk for a few minutes; (3) Sanders came in and punched in his own timecard; (4) Whitaker was not around when McArthur's call came in; and (5) he sent up Sanders to investigate McArthur's telephone call.

19. At his interview, Sanders indicated that: (1) Whitaker punched in his own timecard at 12:00 a.m.; (2) Bragg was the only employee on the first floor when he clocked in; (3) he investigated the telephone call and returned to the first floor around 12:20 a.m.; and (4) Alvarado had a history of harassing him.

20. At her interview, Elizabeth Ross indicated that: (1) she saw Whitaker punch in; (2) she was on the first floor with Bragg and Carolyn Ross; (3) she went out the Chicago Avenue door to her car and stayed for approximately 15 minutes; (4) when she came back, Bragg told her that Sanders and Whitaker had gone upstairs to investigate a disturbance on the 22<sup>nd</sup> floor; and (5) she did not see Sanders at any time that night.

21. At her interview, Carolyn Brown indicated that: (1) she saw Whitaker punch in his timecard; (2) she stayed on the first floor until 12:05 a.m.; (2) Ross and Bragg were still at the front desk when she left; and (3) she did not see Sanders.

22. At his interview, Whitaker (who was also a security guard) indicated that: (1) there had been no report of a disturbance when he punched in; (2) the employees were talking about the fact that Sanders had not yet clocked in; (3) he spoke with Alvarado and then went upstairs to change his clothes; (4) Brown, Ross and Bragg were still on the first floor when he spoke to Alvarado; and (5) he did not see Sanders until after he had finished his rounds.

23. At his interview, Alvarado indicated that Sanders had not come in by 12:30 a.m.

24. Johnson also spoke with McArthur about his alleged telephone call on February 25, 2000. McArthur confirmed that he had placed a telephone call to report a disturbance on the 22<sup>nd</sup> floor on the night in question, and that Sanders had responded to the call. He could not, though, recall what prompted the call and told Johnson that "it was nothing." Johnson did not believe McArthur and concluded that there never was an incident since: (1) there were no more than ten people who lived on the floor which otherwise required a security key to enter; (2) McArthur had lived on the floor long enough to have known his neighbors; and (3) McArthur should have been able to recall an alleged disturbance that was significant enough to have merited a phone call to the front desk. Johnson relayed her

conversation with McArthur to Lafley and Ford and gave them her observations about McArthur's credibility.

25. At some point after the Committee had gathered the written and oral statements, the Committee discussed the employees' statements, the layout of the first floor, the speed, location and programming of the elevators and the sight lines. Based on said information, Lafley, Ford and Johnson believed that: (1) at 12:00 a.m. Bragg relieved Brown at the switchboard, and Whitaker punched in at that time; (2) at 12:01 Whitaker, Brown and Ross were on the first floor and should have seen Sanders punch his timecard at that time; (3) at around 12:05 Sanders still had not come into work, and Whitaker took the elevator to his room to change clothes to begin his shift; (4) at 12:05 Ross went to her car for a period of fifteen minutes and could have seen Sanders come into the building; (5) at 12:20 a.m. Ross came back to the first floor from her car and still had not seen Sanders come into work; and (6) Sanders had not come into work by 12:30 a.m. when Alvarado punched out and called Lafley.

26. In making the factual findings as outlined in Finding of Fact No. 25, the Committee thought it was suspicious that Sanders would have gone up to the 22<sup>nd</sup> floor by himself since Sanders had been previously told that such calls should have been handled by security personnel such as Bragg or Whitaker, both of whom were on the first floor at 12:01 a.m. and were available to respond to any disturbance call. The Committee also doubted whether a disturbance call by McArthur ever was made since Whitaker had indicated that no call had come in by the time he left to go upstairs (i.e., 12:05 a.m.) and since McArthur was not forthcoming with any details about the alleged disturbance when he should have been in a position to do so. The Committee also believed that Bragg had punched in Sanders's timecard and was covering up for Sanders.

27. After the Committee members had established what they believed to be the facts, Lafley determined that immediate termination for both Sanders and Bragg was

appropriate because he believed that the timecard violation was intentional and that both Sanders and Bragg had attempted to cover it up. At some point after Lafley had made his decision, the conversation among Committee members turned to the 1997 Alvarado/Georgia incident. Lafley, though, believed that the two incidents were not comparable because he believed that Sanders was not on the premises when his timecard had been punched in while he thought that Alvarado was on the premises getting his tools when his card had been punched in.

28. In March 9, 2000, both Sanders and Bragg received termination letters from Lafley after Lafley had consulted with an individual in Respondent's Human Resources Department about his decision to terminate Sanders and Bragg.

29. Respondent replaced Sanders and Bragg with Richard Matthews and Robert Lyons, both of whom were African-Americans.

30. At all times pertinent to the instant Complaint, the racial composition of Lawson House employees was between 70 to 95 percent African-American.

#### **Conclusions of Law**

1. Complainants are "employees" as that term is defined under the Human Rights Act.

2. Respondent is an "employer" as that term is defined under the Human Rights Act and was subject to the provisions of the Human Rights Act.

3. Complainants failed to establish a *prima facie* case of race discrimination in that they failed to establish that a similarly-situated individual outside of their protected classification received more favorable treatment.

4. Respondent articulated a legitimate, non-discriminatory reason for terminating Complainants from their positions at Respondent.

5. Complainants failed to prove by a preponderance of the evidence that the reason given by Respondent for terminating Complainants from their positions was a pretext for unlawful discrimination.

#### **Determination**

Complainants have failed to show by a preponderance of the evidence that Respondents violated section 2-102 of the Human Rights Act when it terminated Complainants for violating its timecard policy.

#### **Discussion**

In this case Complainants argue that they are the victims of racial discrimination since: (1) Respondent employed a grossly inadequate investigation, which allowed it to come to the wrong conclusion regarding any violation of Respondent's timecard policy; and (2) Respondent applied its timecard policy in an inconsistent manner when it failed to discipline others for the same violation. However, because the Human Rights Act provides employers with considerable leeway in making credibility findings arising out of internal investigations designed to uncover the truth, and because successor supervisors are free to chart a different course for their subordinates in terms of enforcement of existing company policy, I find that Complainants have not established either a *prima facie* case of discrimination or pretext of unlawful discrimination when Respondent explained that Complainants were terminated due to an honest belief that they had violated its timecard policy.

To understand why Complainants lose on their race discrimination claim, it is necessary to review applicable case law concerning what the Human Rights Act requires in order to establish a claim of race discrimination. Specifically, the Commission and the courts have applied a three-step analysis to determine whether there has been a violation of the Human Rights Act. (See, for example, **Thompson and Hoke Construction Co.**, \_\_\_ Ill. HRC Rep. \_\_\_ (1995SF0483, June 2, 1998), and **Loyola University of Chicago v. Illinois Human Rights Commission**, 149 Ill.App.3d 8, 500 N.E.2d 639, 102 Ill.Dec. 746 (1<sup>st</sup> Dist., 3<sup>rd</sup>

Div. 1986).) Under this approach, our Complainants must first establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. Then, the burden shifts to the Respondent to articulate a legitimate, non-discriminatory reason for the adverse actions taken against the Complainants. If Respondent is successful in its articulation, the presumption of unlawful discrimination is no longer present in the case (see, **Texas Department of Community Affairs v. Burdine**, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)), and the Complainants are required to prove by a preponderance of the evidence that the Respondent's articulated, non-discriminatory reason is a pretext for unlawful discrimination.

Respondent initially asserts that Complainants cannot establish a *prima facie* case of race discrimination since the timecard violation demonstrates that Complainants were not performing to its legitimate expectations. However, the Commission and the courts have not always required satisfactory job performance as a necessary element of a *prima facie* case of unlawful discrimination. (See, **ISS International Service Inc. v. Illinois Human Rights Commission**, 272 Ill.App.3d 969, 651 N.E.2d 592, 209 Ill.Dec. 414 (1<sup>st</sup> Dist., 3<sup>rd</sup> Div. 1995), and **Battieste and C.E. Niehoff & Co.**, \_\_\_ Ill. HRC Rep. \_\_\_ (1989CF4075, November 14, 1995).) Moreover, the alternative *prima facie* standard recognized by the court in **Loyola** merely reinforces the long-held notion that an employer may justifiably discipline employees who violate work rules, but only if the disciplinary criterion is applied alike to all of its employees. (**Loyola**, 500 N.E.2d at 753, 103 Ill.Dec. at 646.) Here, Complainants have similarly accused Respondent of disparate treatment with respect to enforcement of its work rules. As a result, Respondent's focus on Complainants' failure to abide by its timecard policy has relevance only with respect to the analysis of the pretext portion of Complainants' claim.

Alternatively, Respondent maintains that Complainants cannot establish a *prima facie* case of discrimination since Complainants failed to demonstrate that similarly situated co-workers outside their protected classification received more lenient treatment. Specifically, Respondent notes that the only potential comparable co-workers outside of Complainants'

protected classification that received arguably more favorable treatment were Alvarado and Georgia, when they did not receive any tangible discipline for a similar timecard violation in 1997. However, Respondent insists that the Alvarado/Georgia incident cannot be used to establish a *prima facie* case of race discrimination because the Alvarado/Georgia incident was remote in time and was separated by the installation of a new executive director who had a stricter standard about enforcement of work rules. See, for example, **Buie v. Quad/Graphics Inc.**, 366 F.3d 496 (7<sup>th</sup> Cir. 2004), for the proposition that discipline imposed by different decision-makers sheds no light on the reasons for disciplining any employee, and **Welch and Appellate Court of Illinois**, \_\_\_ Ill. HRC Rep. \_\_\_ (1997CA0330, May 16, 2006), where the Commission, in citing favorably to **Snipes v. Illinois Department of Correction**, 291 F.3d 460, 463 (7<sup>th</sup> Cir. 2002), emphasized that for purposes of establishing a *prima facie* case of discrimination, a complainant must show that the same person made the relevant adverse employment decisions. Slip Order and Decision at p. 11.

Complainants initially submit that Respondent's position cannot be correct since, according to Complainants' counsel, no case law supports the proposition that an employer can alter the enforcement of its own policies once a pattern of enforcement has been established. In this respect, Complainants maintain that Alvarado and Georgia are suitable comparables because it does not particularly matter that Lafley was not the decision-maker with respect to Alvarado/Georgia incident since he could not ignore the favorable treatment given to them when determining the appropriate discipline for Complainants. However, the case used by Complainants to support their stance, i.e., **Curry v. Menard**, 270 F.3d 473, 478 (7<sup>th</sup> Cir. 2001), does not assist them in this regard and actually bolsters Respondent's position since it too rejected as proposed comparables, co-workers who received more lenient treatment from a prior supervisor who was more lax about enforcement of the same work rule. Thus, because Lafley was not the decision-maker with respect to the Alvarado/Georgia incident, I agree with Respondents that Complainants have not produced any similarly-

situated co-workers who received more favorable treatment so as to establish a *prima facie* case of race discrimination.

Respondent, though, proffered an articulation as to the reason for Complainants' terminations, i.e., its honest belief that Complainants had violated its timecard policy. Therefore, its submission of an articulation effectively drops the issue regarding the sufficiency of Complainants' *prima facie* case from further consideration by the Commission (see **Clyde and Caterpillar, Inc.**, 52 Ill. HRC Rep. 8, 10 (1989)), and I would note that Complainants do not seriously contend that this articulation, if believable, would not be sufficient to qualify as a legitimate, non-discriminatory reason for taking an adverse employment action under **Texas Department of Community Affairs v. Burdine**, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). Accordingly, the only real question remaining in the instant case is whether Complainants have shown by a preponderance of the evidence that Respondent's articulation is a pretext for unlawful discrimination.

Initially, Complainants contend that Lafley was not believable when testifying that he wanted to raise the performance standards of Respondent's employees since the record established that he was aware of rumors of timecard violations and yet did not act on them. In short, Complainants maintain that they were disciplined for something that Lafley actually tolerated in the workplace. However, Complainants' argument ignores Lafley's testimony that he could not act upon any of the rumors unless an accuser was willing to come forward and specifically identify a wrongdoer. Indeed, Complainants failed to present any evidence that Lafley ignored concrete allegations about an alleged timecard violation such as the one made by Alvarado on February 25, 2000 and yet failed to conduct an investigation into the allegation. Bragg's testimony that he did not come forward to management with any names of individuals who were the subject of rumors about timecard violations does little to support Complainants' current criticism regarding Lafley's failure to initiate other investigations.

Too, Complainants necessarily walk a legal tightrope by emphasizing Lafley's knowledge concerning rumored violations of the timecard policy. Specifically, such evidence has relevance in their discrimination claim only if it could be said that Lafley did not actually mind the violations, or worse, that he tolerated the violations only with respect to employees who were not African-American. Yet, the record does not indicate the number of rumored timecard violations that Lafley was aware of, or more important, the racial identities of the individuals rumored to have violated the timecard policy. Indeed, where a vast majority<sup>1</sup> of workers in the relevant workforce actually shared Complainants' race, any failure by Lafley to follow up on unsubstantiated rumors of timecard violations would not be evidence of racial discrimination under this record where the statistical probability is that at least some of the rumors concerned African-American co-workers.

Additionally, Complainants' suggestion that Lafley was not serious about enforcing the timecard policy is just not supported by the record. Specifically, the timecard policy was emphasized by Lafley and others at an all-staff meeting with the employees during the last week in January of 2000, and a copy of the policy was placed in employees' paychecks approximately one week prior to the February 25, 2000 incident involving both Complainants. Indeed, both Complainants conceded that in spite of the rumors of non-compliance with the timecard policy, they were aware as of February 25, 2000 that they were required to comply with said policy, and that they could be terminated for non-compliance with the policy. Thus, it is understandable why Lafley would be upset with Complainants given the nearness of their violations to the measures taken by him to prevent said violations.

True enough, Lafley did not terminate Whitaker who arguably violated the timecard policy by punching in and then going to his room at Lawson House to change into his work clothes. However, the seemingly lenient treatment given to Whitaker does not help

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<sup>1</sup> Various witnesses placed the percentage of African-Americans in Respondent's workforce at between 70 to 95 percent.

Complainants' pretext claim since: (1) Whitaker was an African-American, and evidence of favorable treatment given to Complainants' protected classification suggests, if anything, that something other than race led to the decision to terminate Complainants; and (2) the circumstances behind Whitaker's violation are arguably different where Lafley believed that Whitaker was actually at the worksite at all relevant times while he believed that Sanders did not come in until approximately an hour after his timecard had been punched.

Next, Complainants assert that race was the actual motivation that led to their terminations since Lafley and the Committee conducted a grossly insufficient investigation into whether they actually violated Respondent's timecard policy. Specifically, Complainants maintain that: (1) the investigation uncovered no direct evidence of a timecard violation; (2) Complainants' initial accuser, Alvarado, had a history of racist attitudes against African-American co-workers and a history of harassment against Sanders; and (3) the investigation purposely ignored a favorable witness (i.e., McArthur) who had no known bias in favor of Complainants, while giving weight to the statements of co-workers who were viewed by at least one member of the Committee (Johnson) as not telling the whole story. Complainants' arguments in this regard, though, do not persuade.

In general, Complainants' attack on the perceived short-comings of Respondent's investigation is somewhat misplaced since the courts and the Commission have consistently found that the Human Rights Act does not guarantee that an employee receive a flawless investigation. (See, for example, **Ford and Caterpillar**, \_\_\_ Ill. HRC Rep. \_\_\_ (1993SF0242, October 28, 1996), and **Lenoir v. Roll Coster, Inc.**, \_\_\_ Ill. HRC Rep. \_\_\_ (1993SF0549, November 6, 1998).) Indeed, all that the Human Rights Act demands is that the investigation provide management with a reasonable opportunity for uncovering the truth, regardless of the ultimate outcome of the investigation. (See, **Schmitt and Adams County Highway Dept.**, \_\_\_ Ill. HRC Rep. \_\_\_ (1995SF0053, January 13, 1998).) And here, it would seem that Respondent's investigation, which consisted of obtaining numerous statements from

individuals who were allegedly present at or near the front desk at the time Complainants assert that Sanders punched in his timecard, was calculated to do just that. Thus, the allegedly faulty nature of Respondent's investigation has relevance in this case only to the extent that Complainants can show that Respondent's management did not honestly believe the results of its own investigation.

Accordingly, Complainants' contention that the instant investigation was faulty because it failed to uncover any direct evidence of a timecard violation misses the mark, and not surprisingly, Complainants have not cited to any case law to support their apparent suggestion that employers cannot hold an honest perception that an employee has violated a work rule unless they have direct evidence of the violation or somehow had actually caught the employee "in the act" of committing the violation. Moreover, Complainants' suggestion is somewhat ironic since, while Respondent has denied Complainants' allegations of intentional discrimination, they have submitted their own claim of a Human Rights Act violation based solely on circumstantial evidence of discrimination. In this respect, Complainants have not explained why employers cannot use similar types of evidence to determine the existence of workplace violations in the face of denials by their employees.

Complainants, though, submit that the results of the investigation were skewed because the Committee relied upon the report of Alvarado, whom Complainants assert had a known animosity against African-American co-workers in general and against Sanders in particular. Indeed, the Commission has looked to the underlying motivation of individuals supplying decision-makers with faulty information when determining the adequacy of investigations conducted by employers. (See, for example, **Dewberry and Kraft Foods, Inc.**, \_\_\_ Ill. HRC Rep. \_\_\_ (1994CF01653, August 29, 2001), and **Rivera and Group W Cable, Inc.**, \_\_\_ Ill. HRC Rep. \_\_\_ (1985CF1868, October 25, 1993).) Given the report of Alvarado's prior harassment of Sanders, Complainants might have a valid point if Respondent had relied solely on Alvarado's report when determining that Sanders was not at the worksite

at the scheduled time. But that is why Respondent conducted an investigation to verify or debunk Alvarado's allegations in the first place. In this regard, Respondent obtained statements from other co-workers (i.e., Whitaker, Brown and Ross) who essentially corroborated Alvarado's claim that Sanders was not at the workplace when someone punched in his timecard. As such, it was the statements of these co-workers, who shared Complainants' race and, more important, had no similar animosity towards either Complainant, that take the instant investigation outside the contours of investigations at issue in either Dewberry or Rivera.

Complainants also contend that the investigation was flawed because Respondent improperly ignored the statement of an impartial witness (i.e., McArthur) in favor of the statements given by Complainants' co-workers whom, at least Johnson believed, were not telling the whole truth as to what happened on the night in question. The first problem with Complainants' argument is that the Committee did not "ignore" McArthur's statement where the record shows that the Committee did review it and compared it to statements made by Complainants' co-workers. The second problem with Complainants' stance is that the Committee was entitled not to take McArthur's statement at face value given Johnson's report that McArthur could not provide any details as to the alleged incident that was supposedly upsetting enough for him to have made the telephone call.

Other facts also call into question McArthur's statement that Sanders was up on the 22<sup>nd</sup> floor investigating a disturbance call. Specifically, Whitaker's timecard indicated that he had punched in at 12:00 a.m., and Bragg testified that: (1) McArthur's alleged telephone call came at a time when Whitaker was "not around"; and (2) Sanders punched in his timecard after he told Sanders about McArthur's telephone call. (Tr. at p. 557.) If, contrary to Whitaker's statement that there had been no disturbance call at the time he punched in the time clock, McArthur's alleged telephone call came prior to 12:00 a.m., Bragg never explained why he did not send Whitaker up to investigate the disturbance call since: (1) as a security

guard, Whitaker, as opposed to Sanders, was the primary person that was supposed to respond to disturbance calls; and (2) according to his timecard, Whitaker would have presented himself to Bragg to accept the assignment prior to Sanders's alleged arrival.

True enough, McArthur's telephone call could have come in the minute between the punching in of Whitaker's and Sander's timecards. But in order for that to have occurred, according to Bragg's version of the events, Whitaker would have had to: (1) walk over from the front desk to the lounge near the elevators; (2) have a conversation with Alvarado; (3) push the elevator button and wait for the elevator to come down from the 21<sup>st</sup> floor;<sup>2</sup> and (4) leave the first floor before Sanders arrived and before McArthur allegedly telephoned Bragg in an upset manner concerning a problem that McArthur later brushed off as being "nothing". But there is more. Within that same minute, McArthur would have had to relay his message to Bragg, who in turn would have had to relay McArthur's message to Sanders before Sanders allegedly punched in his timecard at 12:01 a.m. Respondent, though, need not ignore laws of physics in order to give credence to Complainants' version of the events. In short, there was an abundance of facts before the Committee to support its belief that Sanders was not on the first floor to punch in his own timecard at 12:01 a.m., and that Bragg had actually punched in Sander's timecard.

But the pretext issue does not end at this juncture since, as Complainants see it, it is of no legal significance for purposes of this discrimination claim if Respondent came to its belief of a work rule violation via statements containing circumstantial evidence given by Complainants' co-workers or, for that matter, via statements by eyewitnesses. (Tr. at pgs. 495-96.) This is so, according to Complainants, because Lafley still could not discipline either Bragg or Sanders for any timecard violation because Respondent did not discipline Alvarado or Georgia in 1997 under McAfee's tenure as executive director. However, as explained

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<sup>2</sup> Recall that the elevator was programmed to automatically go to the 21<sup>st</sup> floor when not in use.

above, the fundamental error in Complainants' stance is that neither Alvarado nor Georgia are similarly situated with our Complainants because Lafley was not in charge of Respondent and did not make the disciplinary decision at the time of the Alvarado/Georgia incident. In short, any pattern of non-enforcement of work rules established by McAfee was not binding on any successor supervisor.

Finally, it is difficult to attribute any African-American animosity on the part of Lafley if, as he testified and as our Complainants insist, he was unaware of the Alvarado/Georgia incident at the time he made the decision to terminate them, since Lafley could not know at that time that his decision in disciplining Complainants was an act that would favor any particular racial group. Yet, even if he was aware of the Alvarado/Georgia incident at the time he made the decision to terminate Complainants, the court decisions in **Buie** and **Snipes**, as well as the Commission's decision in **Welch**, demonstrate that he is free to do so as long as he applies his enforcement regimen uniformly. Here, Complainants lose on their pretext claim since: (1) they were unable to show how Lafley has ever been inconsistent in enforcing the timecard policy for incidents occurring during his tenure at Respondent; and (2) they were unable to show how the Committee's belief that Bragg had punched in Sanders's timecard was so unreasonable so as to be unworthy of belief.

### **Recommendation**

For all of the above reasons, it is recommended that the Complaints and the underlying Charges of Discrimination of Torre Sanders and Timothy Bragg be dismissed with prejudice.

HUMAN RIGHTS COMMISSION

BY: \_\_\_\_\_  
MICHAEL R. ROBINSON  
Administrative Law Judge  
Administrative Law Section

ENTERED THE 5<sup>TH</sup> DAY OF JUNE, 2006

