FOR PUBLICATION

85-3232

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN JACKSON,	)	
	)	
Plaintiff-Appellant,	)	**On Appeal From the United States District Court for the Northern District of Ohio.**
	)	
v.	)	
	)	
PEPSI-COLA, DR. PEPPER BOTTLING CO. a division of RKO BOTTLERS OF TOLEDO, INC.	)	
	)	
Defendant-Appellees.	)	

Decided and Filed_____

BEFORE: KEITH, MILBURN, Circuit Judges and UNTHANK*

KEITH, Circuit Judge. Appellant John Jackson, a black male, appeals from a judgment in favor of RKO Bottlers in this Title VII discrimination case tried without a jury by Judge Potter. This Court previously heard this case, Jackson v. RKO Bottlers of Toledo, 743 F.2d 370 (6th Cir. 1984), and remanded on the basis that the district court erroneously concluded that plaintiff had not established a prima facie case pursuant to McDonnell-Douglas Corporation v. Green, 411 U.S. 792 (1973). Specifically, the trial court erroneously found that plaintiff had not proved he was qualified for the job of plant superintendent. Plaintiff claims he was not promoted to plant superintendent due to racial discrimination, and that he was unlawfully discharged on December 1, 1980, in retaliation for his having filed discrimination charges. Plaintiff originally filed his lawsuit November 15, 1978.

On remand the trial court accepted plaintiff's prima facie case. Nevertheless, the court determined plaintiff could not prevail because there were legitimate, non-pretextual reasons, proferred by RKO, which adequately explain why he was not promoted. Furthermore, the district court found plaintiff was discharged not in retaliation for filing discrimination charges, but for "assaulting" an hourly employee in the parking lot

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*Honorable G. Wix Unthank, U.S. District Court for the Eastern District of Kentucky, sitting by designation.

after previously being warned that such action would result in his termination. We affirm, finding the decision below rendered by Judge Potter was not clearly erroneous.

I. THE PROMOTION ISSUE

The appellant, John Jackson, began working for the predecessor of RKO Bottlers, Variety Club Beverage Company, of Toledo, Ohio, as a laborer in 1951. In 1966, the Variety Club Beverage Company was purchased by RKO for bottling and distributing Pepsi Cola. The plant superintendent at that time was Daniel Starsky. The general sales manager was Robert Johnson. Following the purchase, a decision was made by RKO to build a new bottling and distribution facility, known as "Hill Avenue".

In early 1978, Starsky, the plant superintendent, was offered the position of managing the RKO Bottling facility in Muncie, Indiana, and Johnson was faced with a decision as to the future operating method of the Toledo facility. The stage was thus set for the crux of plaintiff's complaint: why was he not promoted to plant superintendent? Plaintiff claims it was due to impermissible racial discrimination. We disagree.

Originally, Johnson decided to employ a "team management" concept, rather than use a plant superintendent. This system is frequently used within the bottling industry, and is used by the Pepsi-Cola Bottling Group. There is conflicting evidence as to whether the "team concept" was a contest to see which of three individuals, Kerner, a white, Jackson or Taylor, would succeed Starsky as plant superintendent. However, the system did not work, and Johnson decided to return to a plant supervisor system. The choice for plant supervisor came down to Jackson or Kerner, although Mr. Taylor was given slight consideration.

The district court found that Johnson was familiar with Kerner because they had worked together at the Variety Club prior to the opening of the Hill Avenue facility, and he knew Kerner's achievements and responsibilities as a warehouse supervisor at

Hill Avenue. Johnson was also aware of Jackson's duties and responsibilities at the Variety Club and had a great deal of contact with Jackson between 1969 and 1978.

The evidence as to who would have made the better plant superintendent, Jackson or Kerner, was conflicting. Johnson felt that Kerner was the more qualified to be plant superintendent because he was experienced in all phases of the business. Kerner was experienced in warehousing, and had straightened out the warehousing situation after being brought to Hill Avenue from Variety Club. He had sales experience, which Johnson felt was important to understanding the total scope of the operation. Kerner had successfully run the complex Variety Club operation where he had responsibility for production, warehousing, and quality control.

In contrast, Jackson had little or no involvement in quality control at Variety Club, and no direct involvement at Hill Avenue. During the period of time that Kerner was running the entire Variety Club operation, Jackson was running merely one line at Hill Avenue. Jackson had no night warehousing experience, and he had no sales experience. Jackson had also been criticized on occasion for his handling of employees on a day-to-day basis. He was not familiar with stock ordering, forecasts, or budgets. Johnson also felt that, during the "team concept" period of management, Jackson was trying to operate production in the same manner as Starsky, and Johnson did not wish that type of management to continue.

Although Starsky testified that he would have made Jackson plant superintendent had the decision been his, this decision was based primarily on Jackson's personal loyalty to Starsky. Even Starsky believed Kerner had more total experience in running the plant operations. The district court found that Johnson's decision to promote Kerner over Jackson was based on Kerner's overall greater experience in the bottling industry, and that racial animus did not play a part in the promotion decision.

II. THE RETALIATORY DISCHARGE ISSUE

In 1976 an incident occurred between an hourly employee, McGee, and Jackson, who was a supervisor at that time. Jackson had given McGee instructions and McGee started swearing at him. When McGee approached Jackson, Jackson grabbed McGee and pushed him away. This incident was observed by John McCullum, who was a union steward. McCullum brought the incident to the attention of Bob Johnson, who at that time was general manager. Johnson spoke to both McGee and Jackson in McCullum's presence, and heard their versions of what had occurred. Johnson told McGee that he was wrong for swearing at Jackson, and told Jackson that, if he ever laid hands on another hourly employee, he would be fired. In May of 1979 Jackson grabbed the shoulders of a female production employee, Carol Cowell, as if to kiss her, and, later that day when the same employee requested that Jackson sign her time card, Jackson responded "for a little sugar, anything can be done around here". This incident was brought to Johnson's attention, and he called Ms. Cowell to his office. Johnson asked Ms. Cowell if she wished to sign a complaint against Jackson, and she indicated no. Johnson told Cowell to think about her decision for a few days. Subsequently, Ms. Cowell told Johnson that Jackson had apologized to her and that she wanted to drop the matter and forget it. Johnson did not pursue the matter further. Jackson argues that Johnson's query to Ms. Cowell to "think over" her decision not to lodge a complaint, indicates that RKO was out to "get him" in retaliation for his filing suit.

In November of 1980 the RKO facility was involved in a bitter labor dispute. On Saturday, November 22, 1980, the day after the strike ended, Frank Taylor, Robert Haas, an hourly paid maintenance mechanic, and another employee had ridden to work together. Television sets were set up in the plant so that the personnel could watch the Ohio State-Michigan football game. On previous occasions Haas and Jackson had bet with each other on football games. When Haas lost a bet it was his practice to

pay Jackson the following Monday, and Jackson testified that he never had any concern about Haas paying on his bets. That Saturday Haas and Jackson discussed betting on the game, but Jackson wanted Michigan and points and Haas refused to bet.

At the end of the day and after the conclusion of the game, when Haas, Taylor and another employee were leaving the plant, Jackson asked Haas for $5.00 on his bet. Haas replied that they didn't have a bet and continued out of the plant. As the three got to Haas' car, Jackson came out of the plant hurriedly and again yelled to Haas "Where is my $5.00?" Haas again replied that he didn't have his $5.00 and that they did not not have a bet. Jackson ran up to Haas and twice pushed his hand away from the lock as Haas was trying to open the car door. Jackson had Haas pinned against the side of the car with his body. Jackson then grabbed Haas in the chest area and spun him across one or two parking spaces and then pinned him up against another car. Taylor asked Jackson to let Haas go and also motioned for three security guards, who were sitting in a vehicle across the parking lot, to come over. As the guards approached, Taylor again asked Jackson to let go of Haas and Jackson then complied. Although Jackson considered this incident mere "horseplay", Haas did not, and the incident was reported to Johnson.

The following Monday, Johnson spoke individually with Taylor, Haas and Jackson. He also spoke with one of the guards and requested and read the reports of the other two guards concerning the incident in the parking lot. Jackson told Johnson that the incident had been in fun, but both Haas and Taylor told Johnson that they felt that Jackson had been serious. Johnson concluded that the incident was not mere "horseplay", and that it had broken all the rules of good supervisory procedure since supervisors were expected to set an example for the rest of the plant community. Johnson had previously discussed with his supervisory personnel that any physical contact with an hourly employee was absolutely forbidden. Jackson had been previously warned, after

the McGee incident, that he would be fired if he again laid hands on an hourly employee. On December 1, 1980 Jackson was fired because of the incident in the parking lot.

DISCUSSION

In Title VII cases, plaintiff carries the ultimate burden of proving racial discrimination. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253. Once the plaintiff has proved his prima facie case of racial discrimination under McDonnell-Douglas Corporation v. Green, 411 U.S. 792 (1973),[1] the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the plaintiff's rejection. The plaintiff then has an opportunity to prove that these "legitimate" reasons were mere pretext. Texas Dept. of Community Affairs v. Burdine, 450 U.S. at 253. In the instant case, plaintiff proved his prima facie case regarding the promotion to plant superintendent. The defendant articulated legitimate, non-discriminatory reasons for not promoting plaintiff. Namely, Kerner was more qualified for the position due to his overall breadth of experience. This finding of fact was not clearly erroneous. Plaintiff failed to prove that the reasons articulated by defendant were pretextual. Accordingly, we affirm the district court's holding in favor of RKO.

Plaintiff, likewise, does not prevail on his claim of retaliatory discharge. To establish a prima facie claim of retaliatory discharge, plaintiff must establish: (1) that he engaged in protected opposition to Title VII discrimination or participated in a Title VII proceeding; (2) that he was subject to adverse employment action subsequent to or contemperaneous with his protected activity; (3) there is a causal connection between the protected activity and the adverse employment action. Burrus v. United Telephone

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[1]Under McDonnell-Douglas, to prove a prima facie case of racial discrimination, plaintiff must show: "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S. at 802.

Co. of Kansas, Inc., 683 F.2d 339, 343 (10th Cir. 1982), cert. denied, 459 U.S. 1071 (1982). If a prima facie case is established, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse action. The plaintiff may rebut defendant's "legitimate" action by demonstrating the articulated reason was a mere pretext for discrimination. Id. at 343. Even assuming plaintiff has established a prima facie case, defendant prevails for it has proferred legitimate, non-discriminatory reasons for discharge. Namely, the incident in the parking lot with Haas after previously being warned that "laying hands" on an hourly employee would result in his termination. Plaintiff has failed to produce any credible evidence that this legitimate reason for his termination was mere pretext. Plaintiff claims that Johnson's query to Ms. Cowell to "think over" her decision not to lodge a complaint against Jackson indicates "bad faith" on RKO's part, and is indicative of pretext. We disagree. Logic dictates that if RKO wanted to fire Jackson, they would have simply done so without any "set up" which would possibly subject RKO to a sexual harrassment suit and adverse publicity. Furthermore, the time span of over one year from the time Johnson filed suit, to the time of his firing, militates against a finding of retaliatory discharge.

Accordingly, we affirm the decision of Judge John W. Potter.

TO: JUDGE

FROM: RENEE

RE: The Sixth Circuit case of Jackson v. RKO Bottlers of Toledo, Inc., 85-3232.

INTRODUCTION

The above-styled action is a suit filed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, et seq. , and 42 U.S.C. Section 1981, seeking redress for alleged racial discrimination in the denial of a promotion and retaliatory treatment/discharge. Following the appeal from judgment entered for the defendant by the district court, the Court of Appeals vacated that judgment and remanded the case for further proceedings. Currently at bar of Appeals is the appeal from the decision that followed.

GENERAL IMPRESSION

My gut feeling is that this new decision of the district court is not clearly erroneous--although, given the seemingly pro-plaintiff statements contained in the last Court of Appeals review of this case, perhaps other members of the panel will not think so.

FACTS

The crux of one of the plaintiff's complaints concerns a decision made in 1978 by Robert Johnson (Johnson), the general manager of the defendant, a company which manufactures, bottles and distributes soft drinks. In June of the aforementioned year, Johnson selected Pete Kerner (Kerner), a white man who at that time functioned as warehouse manager, for promotion to replace Dan Starsky (Starsky) as Plant Superintendant. The apparent loser in this arrangement was the plaintiff, a black employee, whose title at the time was "Assistant Plant Superintendant."

On July 12, 1978, the plaintiff filed employment discrimination charges

with the Equal Employment Opportunity Commission (E.E.O.C.) and later that year commenced the present action under 42 U.S.C. Section 1981, later amending his complaint to add his Title VII promotion discrimination claim once he had received his Right-To-Sue letter from the E.E.O.C. In November, 1980, the plaintiff was discharged, after an incident with one of the defendant's hourly employees and the complaint was again amended, this time to include the charge of retaliatory dismissal.

The timetable of pertinent incidents which underlie this action can be listed as follows:

> 1951--PLAINTIFF hired as General Laborer at Varsity Club (facility later bought by defendant company). KERNER also hired at same facility as truck loading supervisor in the Warehouse, then functioned as route salesman and, finally, as Assistant Plant Superintendant (with the exception of a few months when he worked at another bottling plant).
>
> 1969--PLAINTIFF became "Line Foreman" at the new plant directly under Dan Starsky, the Plant Superintendant, for whom he worked. KERNER, who had remained at the old Varsity Club plant as "Assistant Plant Superintendant", switched over to new plant as "Night Warehouse Supervisor" in 1972, when the old plant closed.
>
> 1974--PLAINTIFF was named "Production Supervisor" at the new facility, again still working under Starsky.
>
> 1976--(Alleged incident in which the PLAINTIFF and an hourly employee came into contact and the PLAINTIFF was warned of policy against touching hourly employees.)
>
> 1978--After experimentation with a "team management" concept for a few months, Johnson appointed KERNER to replace Starsky, who had had no sales or night loading experience. PLAINTIFF initiates legal action.
>
> 1979---(Alleged incident in which the PLAINTIFF harassed female employee(s) and/or Johnson allegedly tried to get them to file such charges against the PLAINTIFF.)
>
> 1980--(Incident of contact between PLAINTIFF and hourly employee Haas.) PLAINTIFF discharged.

In its memorandum, the Court of Appeals examined the plaintiff's claims. It was held that the district court's findings of fact with respect to the

promotion discrimination claim were clearly erroneous due to the specific factual errors, since (1) the plaintiff did, indeed, meet the minimum qualifications for the position, (2) the trial court dredged up the "poor judgment" justification for the denial of promotion, even though the defendant had never claimed this, and (3) the use of "poor judgment" could not reasonably have been used anyway to justify the lack of promotion since the record did not support evidence that the plaintiff did anything more than take defensive measures against an hourly employee in 1976. Thus, Court of Appeals found that even though the trial court had stated that the plaintiff had established a prima facie case, and gone on to discuss other elements of the case, the Court felt that it was not clear whether the clear errors made with regard to the above-mentioned facts influenced the district court in its other findings.

As to the claim of retaliatory discharge, the trial court had not directly addressed the question of the prima facie case, although it might have implicitly done so. The Court held, however, that it was unclear on the record whether the court considered the plaintiff's attempt to demonstrate pretext or that the court was not influenced by the factual errors cited previously.

With regard to the claim under 1981, this Court noted that the trial court had erroneously required the plaintiff to provide direct evidence of intent and ignored evidence logically supporting the inference of that intent.

Accordingly, this Court remanded the case to the district court for further proceedings consistent with the opinion, including the taking of additional evidence.

Denying the plaintiff's motion to proffer additional evidence, the district court made the following findings of fact:

Pursuant to the Court of Appeals' opinion and findings, this Court finds that plaintiff has made a prima facie case for his Title VII claims of discriminatory denial of promotion and retaliatory discharge and for his 42 U.S.C. §1981 claim. The Court finds that the following findings are pertinent to the issue of pretext and plaintiff's ultimate burden of proving racial discrimination in defendant's refusal to promote and in defendant's decision to fire him.

1. Plaintiff, a black man, began work as a general laborer with Variety Club Beverage Company (Variety Club) on April 1, 1951. In 1966 defendant RKO Bottlers of Toledo, Inc. (RKO) purchased Variety Club including the franchise for bottling and distributing Pepsi-Cola.

2. When Variety Club was purchased by RKO in 1966, James Snyder became general manager, Daniel Starsky was the plant superintendent, and the general sales manager was Robert Johnson.

3. Following the purchase of Variety Club, a decision was made by RKO to build a new bottling and distribution facility, hereinafter known as "Hill Avenue." The new facility opened in June, 1969, and RKO operations were split thereafter into two parts, with the Variety Club operation continuing to produce flavored drinks while Hill Avenue produced only Pepsi-Cola.

4. Prior to the opening of Hill Avenue in 1969, plaintiff was a laborer with no supervisory authority, no warehousing experience other than the physical loading of trucks, and limited quality control experience.

5. Another employee of RKO, Pete Kerner, began his career as a truck loader for Joe Lyn Beverage Company, predecessor to Variety Club, when he was 12 years old. Kerner became a route saleman for approximately nine years, and then moved to the position of head checker-supervisor for the Pepsi-Cola Division of Variety Club. Following the purchase of Variety Club by RKO, Kerner accepted a position with a Pepsi-Cola bottler in Flint, Michigan. In 1966, on the recommendation of Daniel Starsky, the plant superintendent, Kerner was brought back to RKO, after some months in Flint, as assistant plant superintendent.

6. Daniel Starsky went to the Hill Avenue facility when it opened in June of 1969, and Pete Kerner was made plant superintendent of Variety Club. Although Starsky gave Kerner some guidance, he visited the Variety Club plant infrequently, and Kerner was essentially in control of the production and warehousing aspects of Variety Club.

7. Plaintiff went to Hill Avenue in 1969 as a working line foreman. Daniel Starsky did not believe that Jackson was qualified to run the Variety Club operation on his own.

8. At Hill Avenue, Jackson was responsible for one production line until 1972 when a second line was added. From 1972 to 1974 Jackson was in charge of two lines and had responsibility for bottle sorting on one line. During that period Jackson had no responsibility for quality control, which was supervised by John Turner, and he had no responsibility for the night warehousing operation. The plant was run by Starsky, and Jackson had no degree of independence of action or judgment.

9. In supervising the Variety Club operation, Pete Kerner had responsibility for production, warehousing, and quality control from 1969 to 1972. Kerner attended a Pepsi-Cola quality control school in 1978, and Variety Club won the Hires Root Beer quality control award every year until the operation closed down. Kerner did all purchasing except Pepsi concentrate. Kerner performed well in any position that he was placed in and, in the estimation of his superiors, did a fine job at Variety Club.

10. The Variety Club operation was the more difficult of the two operations. The Variety Club facility was obsolete, and the equipment was antiquated. Kerner cleaned up and modernized Variety Club. The fact that Variety Club bottled numerous flavors necessitated frequent changeovers, often

on an hourly basis. The brands also required different packaging, and quality control was more difficult.

11. When the Variety Club bottling operation was shut down in 1972, Kerner became night warehouse supervisor at the Hill Avenue facility. As warehouse supervisor, Kerner also directed any night bottling production that took place.

12. In 1974, John Jackson was made a production supervisor, a salaried position. From 1974 to 1978, he oversaw the bottling lines and the bottler sorters, but Dan Starsky remained in charge of production.

13. John Jackson did not have responsiblity or supervisory authority over quality control, and he did not, in the normal course of his activities, handle ordering or scheduling. Jackson's duties included two bottling lines, bottle sorting, scheduling of personnel, keeping track of absenteeism, filling out daily reports, and taking inventory. Starsky, however, essentially ran a one-man operation, and even when he was absent he left detailed instructions for Jackson to follow. During this period of time Jackson did not exercise independence of action or judgment.

14. In 1976 an incident occurred between an hourly employee named McGee and John Jackson, who was a salaried supervisor at that time. Jackson had given McGee instructions, and McGree started swearing at him. Jackson grabbed McGee and pushed him. The incident was observed by John McCollum, a union steward. McCollum brought the incident to the attention of Bob Johnson, who was general manager. Johnson spoke to both McGee and Jackson in McCollum's presence and heard their versions of what had occurred. Johnson told McGee that he was wrong for swearing at Jackson and told Jackson that if he ever laid hands on another hourly employee he would be terminated.

15. In early 1978 Starsky was offered the position of managing the RKO Bottling facility in Muncie, Indiana, and Johnson, as general manager, was faced with the decision as to the future operating method of the Toledo facility. Johnson decided, in April, 1978, to go to a "team management" concept. That system is used within the bottling industry and is used by the Pepsi-Cola bottling group.

16. Johnson felt that Starsky's method of "one-man" operation had caused problems. Starsky was a strong-willed individualist who did not listen to advice. He only delegated minor authority and apparently did not believe in long-term planning. Starsky tended to keep everything in his head. Johnson did

not want the plant operated in that fashion since he felt that Starsky's method had cost sales and caused interruption of loading patterns.

17. When Starsky left, Johnson felt he had to get a handle on the whole operation, and he felt the best way to do that was to use the team management concept and break up Starsky's authority into three areas. He decided to put Kerner in charge of warehousing, Jackson in charge of production, and Frank Taylor in charge of maintenance. The three were paid equally and were to function as a team. The three had equal responsibility.

18. After two months, however, Johnson did not believe that the operation was running smoothly under the team concept of management, and, since they were entering into their busiest season, Johnson felt that he had to return to a plant supervisor system.

19. The operation of the facility under the team concept was not a test or contest to see which of the three individuals would succeed Starsky as plant superintendent.

20. Johnson's choice came down to a decision between Kerner and Jackson because Taylor, although given some consideration because of his fast learning ability, had no experience in production or warehousing.

21. Johnson was familiar with Kerner because they had worked together at Variety Club prior to the opening of the Hill Avenue facility, and he knew Kerner's achievements and his responsibilities as warehouse supervisor at Hill Avenue. He was also aware of Jackson's duties and responsibilities at Variety Club and had a great deal of contact with Jackson between 1969 and 1978. Because of the relatively small size of the operation, Johnson was aware of who did what.

22. It was the company's policy to promote from within the organization whenever possible. While Johnson had no written guidelines for supervisory promotion, the primary criterion was work experience. In filling the position of plant superintendent, Johnson was looking for someone who had overall experience in the bottling industry, including production, quality control, night warehousing, and sales. He was also looking for someone qualified to supervise a relatively large group of people.

23. Johnson felt that Kerner was the more qualified to be plant superintendent because he was experienced in all phases of the business and could look at the total concept. Kerner was experienced in warehousing, and, indeed, had straightened out the warehousing situation after being brought to

Hill Avenue from Variety Club. He had sales experience, which Johnson felt was important to understanding the total scope of the operation. Kerner had supervised and had had direct involvement in quality control at Variety Club. Kerner, moreover, had successfully run the difficult Variety Club operation where he had responsibility for production, warehousing, and quality control.

24. Jackson, on the other hand, had had little or no involvement in quality control at Variety Club, other than what could be performed by any filler operator, and no direct involvement at Hill Avenue. During the period of time that Kerner was running the entire Variety Club operation, Jackson was running one line at Hill Avenue. Jackson had no night warehousing experience, and he had no sales experience. Jackson had also been criticized on occasion for his handling of employees on a day-to-day basis. He was not familiar with stock ordering, forecasts, or budgets. Johnson also felt that, during the "team concept" period of management, Jackson was trying to operate production in the same manner as Starsky, and Johnson did not wish that type of management to continue.

25. Although Starsky testified that he would have made Jackson plant superintendent had the decision been his, the Court finds that Starsky would have done so because of Jackson's personal loyalty to him.

26. Starsky believed that Kerner had more total experience in running the operations of the plant.

27. Although Johnson named Kerner plant superintendent, Jackson remained production manager, the second highest position in the plant, and he suffered no loss in pay or benefits.

28. The Court finds that Johnson's decision was based on Kerner's overall greater experience in the bottling industry, that Johnson was justified in relying on breadth of experience in making his decision, and that race did not play a part in the promotion decision.

29. On July 12, 1978, Jackson filed charges of employment discrimination based on Kerner's being named a plant superintendent, and he was subsequently notified by the EEOC that a finding of no probable cause had been made on his charges.

30. Between June 19, 1978, the date of Kerner's promotion to plant superintendent, and December 1, 1980, Jackson remained the production manager of RKO Bottlers of Toledo.

31. In May, 1979 Jackson grabbed the shoulders of a female production employee as if to kiss her, and, later that day, when the same employee requested that Jackson sign her time card, Jackson responded "for a little sugar, anything can be done around here." The employee, Carol Cowell, told another employee what had occurred. She did not go to work the following day because she was upset over the incident. The next day she told a second employee, Gary Snyder, what had occurred, and Snyder told her that he thought the company could be sued for sexual harrassment and that she probably should be talking to Mr. Johnson. Johnson subsequently called her to his office and inquired as to what had upset her. She told Johnson what had happened, and he asked if she would sign a statement concerning the incident. Cowell indicated that she did not wish to do so. Cowell told Johnson that the same sort of thing had happened to another employee, Beth Alexander. Johnson called Alexander to his office and asked her about Jackson. Alexander indicated that she had had some problems with Jackson but had handled them herself. At no time was any pressure placed upon Cowell to lodge a complaint against Jackson. Johnson told Cowell to think about it for a few days and decide what she wanted to do. Johnson also talked to Jackson and got his side of the story. Johnson had felt, as a matter of corporate policy and good business policy, that it was something that he, as general manager, had to look into. Subsequently, Cowell told Johnson that Jackson had apologized to her and that she wanted to drop the matter and forget it. Johnson did not pursue the matter further. The Court finds that Johnson's actions were not taken to harass Jackson or retaliate for his having filed discrimination charges. Cowell testified that, prior to the May, 1979 incident with Jackson, she and Jackson had hugged and kissed in a friendly fashion, but that the May, 1979 incident was not "friendly."

32. During the period following his filing of charges and before his termination at RKO, Jackson was removed from his office, production meetings were occasionally held without him, and his production schedules were occasionally changed. The actions were not systematic, were within the legitimate prerogatives of Kerner as plant superintendent, and were not related to Jackson's filing of discrimination charges.

33. In November of 1980 the RKO facility had been involved in a bitter labor dispute.

34. On Saturday, November 22, 1980, the day after the strike ended, Frank Taylor, Robert Haas, an hourly paid maintenance mechanic, and another employee had ridden to work together.

35. Television sets were set up in the plant that day so that the personnel could watch the Ohio State - Michigan football game. On previous occasions Haas and Jackson had bet with each other on football games. When Haas lost a bet it was his practice to pay Jackson the following Monday, and Jackson had never had any concern about Haas paying his debts. That Saturday Haas discussed betting on the game with Jackson, but Jackson wanted Michigan and points, and Haas refused to bet.

36. At the end of the day, and after the game, when Haas, Taylor, and the other employee were leaving the plant, Jackson asked Haas for $5.00 on his bet. Haas replied that they did not have a bet and continued out of the plant.

37. As the three got to Haas' car, Jackson came out of the plant hurriedly and asked Haas for his $5.00. Haas again replied that he did not have his $5.00 and that they did not have a bet. Jackson ran up to Haas and twice pushed his hand away from the lock as Haas was trying to open the car. At that point Jackson had Haas pinned against the side of the car with his body. Jackson then grabbed Haas in the chest area and spun him across one or two parking spaces and then pinned him against another car.

38. Taylor asked Jackson to let Haas go and also motioned for three security guards, who were sitting in a vehicle across the parking lot, to come over. As the guards approached, Taylor again asked Jackson to let go of Haas. Jackson complied. The guards said they would have to report the incident and asked Jackson his name, but Jackson refused to give it to them. Taylor gave the guards Jackson's name. Jackson then went back into the plant, and Haas, Taylor, and the other employee drove around to the front of the facility.

39. Taylor went into the office to file a report on the incident with Robert Johnson, but Johnson was not on the premises. While Taylor was inside the office, Jackson came up to the car and told Haas that he was just "funning" with him. Haas, however, did not believe that Jackson had been acting in fun. Taylor likewise considered it a serious incident and reported it to Johnson by telephone late that evening. Taylor felt he had to report the incident because Haas was one of his employees.

40. The following Monday Johnson spoke individually with Taylor, Haas, and Jackson. He also spoke with one of the guards and requested and read

the reports of the other two guards. Jackson told Johnson that the incident had been in fun, but both Haas and Taylor told Johnson that they felt that Jackson had been serious.

41. Johnson concluded that the incident had been serious in nature, and he felt that Jackson had broken the rules of good supervisory procedure since supervisors were expected to set an example for the rest of the plant community. Johnson felt that the incident was a hostile act toward an hourly employee. Johnson had in the past discussed with his supervisory personnel this type of contact with hourly employees and had told them that any physical contact with an hourly employee was absolutely forbidden. Jackson had been warned personally, after the McGee incident, that he would be terminated if he laid hands on an hourly employee again.

42. There had been two other supervisors terminated at RKO, prior to Jackson, both of whom were white. In neither case were the individuals given "hearings." In the RKO organization, salaried supervisors are not subject to the grievance or arbitration procedures mandated by the collective bargaining agreement.

43. John Jackson, in the course of the trial, produced evidence of two white hourly employees who had committed offenses which could have resulted in termination but who had received lesser penalties. Both employees, however, were hourly employees subject to the procedures and terms of the collective bargaining agreement. The defendant produced evidence of numerous black hourly employees who had committed offenses which could have resulted in termination but who were also not fired because of the union agreement. Jackson, however, was not subject to the grievance procedure.

44. Jackson was terminated, because of the incident in the parking lot, on December 1, 1980.

45. Jackson subsequently filed a charge of retaliatory discharge with the Equal Employment Opportunity Commission and the Ohio Civil Rights Commission on May 22, 1981, claiming that he was discharged because he had filed previous charges of race discrimination against RKO. The charge was dismissed by the Ohio Civil Rights Commission, with the finding of no probable cause, on July 1, 1982. The Court, having observed and heard the witnesses called to testify on the incident in the parking lot, does not credit plaintiff's testimony that he was only "playing" and finds that it was a serious breach of supervisory

APPLICABLE LAW

It is the settled law that once the prima facie case is made out by the plaintiff, the defendant must articulate, through admissible evidence, a legitimate, nondiscriminatory reason for the action taken.[1] United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 714 (1983); Grubb v. W.A. Foote Memorial Hospital, 741 F.2d 1486 (6th Cir. 1985). If the defendant carries this burden of production, the presumption drops from the case. United Postal Service Board of Governors, 460 U.S. at 715.

If such a situation, the plaintiff must then prove, by a preponderance of the evidence, that the articulated reason for the action was pretextual and not the true reason, either by showing that a discriminatory reason was the more likely motivation, or that the articulated reason is unworthy of belief. Grubb, 741 F.2d at 1493. However,the essential factual inquiry is still whether the defendant intentionally discriminated against the plaintiff. Id. Stated another way, the factfinder must decide the ultimate factual issue of whether the defendant intentionally discriminated against the plaintiff. United States Postal Service Board of Governors, 460 U.S. at 715.

There must be evidence, however, to support the inference that the punitive action was racially motivated. A disciplinary measure against a black does not in itself justify a finding that it is wrongfully motivated; in what is essentially a claim of disparate punishment, plaintiff must introduce evidence to show that similarly situated white employees were not punished for workplace mistakes or oversights similar to that committed by the plaintiff. Nichelson v. Quaker Oats Company, 752 F.2d 1153, 1156 (6th Cir. 1985).

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[1] Although direct evidence of discriminatory intent is not part of the prima facie case, if the plaintiff has produced such evidence as part of his case, this may be held to shift to the employer the burden of proving (not merely producing, as in the normal situation) legitimate, nondiscriminatory reasons for its action. Bell v. Birmingham Linen Service, 715 F.2d 1552 (11th Cir. 1983).

A district court may not properly find that the defendant did not promote the plaintiff because of her race where it was undisputed but that the position duty was to oversee the work of the certain monitors on the floor, the plaintiff had no experience in the lower positions, and the persons promoted did have such experience. Nichelson, 752 F.2d at 1158-59.

This allocation of the respective burdens may also be applied in the adjudication of race discrimination claims arising under 42 U.S.C. Section 1981. Grubb, 741 F.2d at 1493.

The findings of the trial court on this issue are subject to review under the clearly erroneous standard of Fed. R. Civ. P. 52(a). Grubb. W.A. Foote Memorial Hospital, 741 F.2d 1486 (6th Cir. 1985).

DISCUSSION

As I stated previously, in the General Remarks section, I believe that the new decision of the district court not to reopen the evidence and entering a judgment for the defendant company is not clearly erroneous.

My feeling as to the promotion decision is that there is sufficient evidence of record for the court to determine that the decision was not based on racial considerations, but was actually based on an examination of the types of experience possessed by both candidates and also as to management style (i.e., Johnson believed that Jackson followed the old Starsky approach too closely).

The feeling about the retaliation charge decision by the district court is much the same, although just a bit less strong. This might be an area you might want to question counsel on during oral argument.