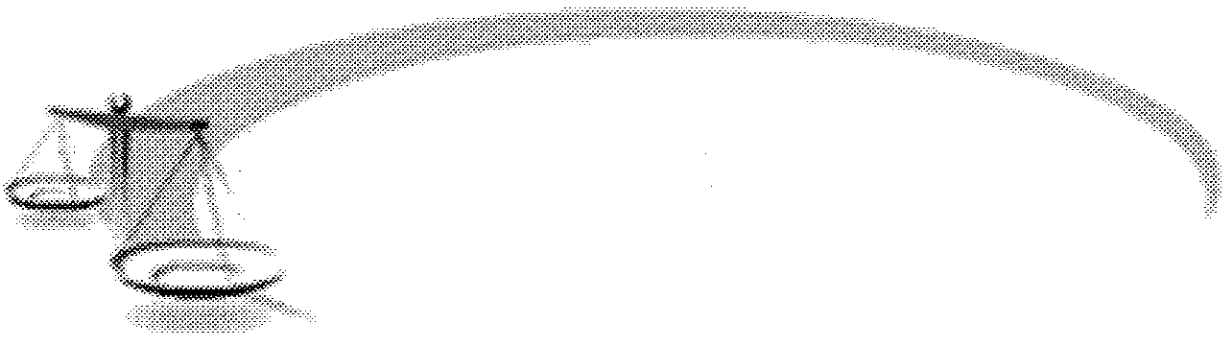

#150921-EM06 Robert Finch II
vs. FKI Automotive
formerly known as
Keller Brass

Order
Nanette L. Reynolds, Director

STATE OF MICHIGAN
CIVIL RIGHTS COMMISSION
CADILLAC PLACE
3054 WEST GRAND BOULEVARD, DETROIT, MI 48202

MICHIGAN DEPARTMENT OF CIVIL RIGHTS, *ex rel.* ROBERT FINCH, II,

Claimants,

MDCR No. 150921-EM06

v

FKI AUTOMOTIVE formerly known as KEELER BRASS,

Respondent.

_____/

ORDER

At a meeting held at the Michigan Civil Rights Commission held in Detroit, Michigan on the 7th day of October, 2002

In accordance with the Rules of the Michigan Civil Rights Commission, a Hearing Referee heard proofs and arguments and made proposed findings of fact and recommendations regarding the issues involved in this case. While given the opportunity to do so, neither the Claimant nor the Respondent have filed written exceptions or requested oral argument before the Commission. Commissioner Mossa-Basha has issued an Opinion, adopted by a unanimous vote of the Commission, affirming the Referee's recommendations. That Opinion shall be made a part of this Order. The Commission makes the following findings of fact and conclusions of law.

Findings of Fact

1. Claimant, Robert Finch, II, is an African American male.

2. At all pertinent times, Claimant, Robert Finch, II, was a resident of Grand Rapids, Kent County, Michigan.

3. At all pertinent times, Respondent, Keeler Brass Co., d/b/a FKI Automotive was a Michigan corporation doing business in Kentwood, Kent County, Michigan.

4. Respondent Dura Automotive Systems, Inc., as present owner and operator of the business in Kentwood, formerly owned by Keeler Brass, d/b/a FKI Automotive, has agreed to defend this action on behalf of the named Respondent, and has accepted responsibility for any monetary judgment that might arise while reserving any rights it may have against FKI.

5. Claimant, Mr. Finch, began working with Keeler Brass, d/b/a FKI Automotive, on or about August 6, 1990 in the paint department.

6. In 1995, Claimant Finch experienced a short lay off from the paint department but was notified of an open position on third shift in the plastic plating department and accepted the position.

7. Claimant was employed at Keeler Brass, d/b/a FKI Automotive as a racker/unracker in the plating department 442 at the time of the incidents alleged herein.

8. That Mr. Finch's third shift hours in the plastic plating department were from 10:00 p.m. to 6:00 a.m.

9. That there were three other African American employees on the third shift in the plastic plating department besides Claimant Finch, Michael Bernard, Ed Pugh and Adrian Cockrell.

10. That the job description in the plating department required preventive maintenance work as part of the job duties of the employees.

11. Smaller preventive maintenance tasks were performed on a daily basis, however, the cleaning of tanks and replacing of the heavy anode bars were done on Saturday as overtime.

12. That the only employees exempt from working Saturday preventive maintenance in the plating department were the two women on the third shift, Theresa Mitz and Sharon Parmenter.

13. Preventive maintenance overtime for Saturdays did not have to be posted. Exhibit C, IV General Section. Notification of Saturday overtime work was given verbally in the plating department.

14. Preventive maintenance overtime, when it was scheduled, required equal numbers of employees from the first and third shifts and on May 18, 1996, there were four employees from the first shift but only three employees from the third shift. No one called in from the third shift.

15. Preventive maintenance overtime always required machine operators to be present. Those individuals on the third shift were Jim Slagter and Dale Vruggink and from the first shift were Duane Vork and Bryan Kooiman.

16. Mr. Slagter, Mr. Vruggink, Mr. Vork and Mr. Kooiman all worked preventive overtime on May 18, 1996.

17. Claimant did not work preventive maintenance overtime on May 18, 1996.

18. Claimant did not work any preventive maintenance overtime in 1996.

19. From August 1995 through December of 1995 Claimant only worked three of the possible twelve Saturday overtime days.

20. On April 13, 1996, Claimant was scheduled to work Saturday overtime, but less than an hour before the third shift he called in to avoid working that shift.

21. Respondent's policy required that employees call in more that one hour before their shift. Failure to do so would constitute a no call/no show.

22. Claimant's son's birthday was on May 18th.

23. Claimant's supervisor, Mr. Holliday, wrote Mr. Finch up for a no call/no show offense on May 20th.

24. David Casselman was FKI Automotive's Human Resource Manager.

25. Mr. Casselman investigated Mr. Finch's no call/no show that occurred on May 18th. Speaking to Mr. Finch by phone on May 20th Mr. Finch did not tell him that he had not been verbally advised that he was required to work overtime on May 18th.

26. On or about February 14, 1996, Claimant, Mr. Finch, filed a Civil Rights Complaint against Keeler Brass, d/b/a FKI - MDCR Case No. 149254-EM07, alleging race discrimination.

27. On or about May 23, 1996 the parties entered into a settlement agreement in MDCR Case No. 149254-EM07 and the case was dismissed.

28. A conversation occurred between Ron Holliday and Terri Benedict as witnessed by Michael Dawser where they discussed that the Claimant's failure to call in or show up for work on Saturday, May 18th, was a second occurrence and that he could be discharged for this offense and Ronald Holliday referred to Claimant using a racial epithet "lazy nigger".

29. That Mr. Holliday did not have the authority to discipline or discharge employees without review.

30. That half of the employees under the supervision of Mr. Holliday in the plating department were African American and the other half were Caucasian.

31. That Adrian Cockrell is African American and was appointed Assistant Supervisor by Ron Holliday.

32. Mr. Casselman investigated the May 18th no call/no show and determined that the Claimant, Mr. Finch, was verbally told that he was to work on the 18th in front of another employee.

33. The Respondent consistently terminates employees that have two no call/no shows in a twelve month period of time.

34. That the decision to terminate Claimant's employment was made by the President of FKI Automotive, Daniel Robusto.

35. That Claimant offered no evidence and testified he had no information as to any other employee who had two no call/no shows in a twelve-month period of time and were not terminated.

Conclusions of Law

1. Michigan Civil Rights Commission has jurisdiction over this matter.

2. Claimant, Robert Finch, II, is an African American male, had standing to bring a claim of racial discrimination and retaliation under Section 202 of the Civil Rights Act, MCL 37.2202; MSA 3.548 (202).

3. Claimant was not subject to discrimination based on his race.

4. There is no direct evidence that claimant was subject to racial discrimination based on his race by any of the persons involved in the decision to terminate his employment.

5. Claimant was not able to rebut Respondent's legitimate business reasons for terminating his employment.

6. Claimant produced no evidence that there was a causal connection between engaging in protected activity and the adverse employment action.

7. Respondent did not violate the Elliott-Larson Civil Rights Act.

WHEREFORE, it is hereby ordered that Claimant's Complaint under the Elliott-Larson Civil Rights Act is dismissed.

MICHIGAN CIVIL RIGHTS COMMISSION

Nanette Lee Reynolds

NANETTE LEE REYNOLDS, Ed.D, Director

Dated: October 14 2002

NOTICE OF RIGHT TO APPEAL

You are hereby notified of your right to appeal within thirty (30) days to the Circuit Court of the State of Michigan, having jurisdiction provided by law. MCLA 37.2606.

#150921-EM06 Robert Finch II
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formerly known as
Keller Brass

Opinion
Dr. Yahya Mossa-Basha, Commissioner

STATE OF MICHIGAN
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MICHIGAN DEPARTMENT OF CIVIL RIGHTS, *ex rel.* ROBERT FINCH, II,

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FKI AUTOMOTIVE formerly known as KEELER BRASS,

Respondent.

_____/

OPINION

Dr. Yahya Mossa-Basha, Commissioner

The present action alleges discrimination based on race arising out of Claimant, Robert Finch, II, an African American male, being terminated from his employment for having a second no call/no show within a twelve month period of time. Also alleged is a claim of retaliation based on Claimant having made a complaint of race discrimination on or about February 14, 1996 against Respondent Keeler Brass with the Michigan Department of Civil Rights.

Mr. Finch's February MDCR charge alleged that he was harassed and unfairly disciplined because of his race. Respondent denied the allegations and following an

investigation, a meeting was scheduled for May 23, 1996 between the MDCR investigator, Mr. Finch, and David Casselman, the Human Resources Manager for Respondent. Prior to that meeting, on or about May 18, 1996, Claimant was verbally advised that he was scheduled to work on Saturday, May 18, for preventive maintenance overtime and was a no call/no show.

At the meeting on May 23, 1996, between Claimant, Mr. Casselman and the MDCR investigator, the February charge was resolved and the complaint withdrawn. Testimony was presented by Mr. Casselman that he advised the MDCR investigator of the current pending matter of Claimant's no call/no show and the Company's policy of terminating employees with two no call/no shows in a twelve (12) month period of time. This was Claimant's second no call/no show within a twelve (12) month period of time.

Mr. Casselman testified that it was the Company's consistent policy to terminate employees with two no call/no shows in a twelve (12) month period of time. Testimony was also presented that while a supervisor could report infractions such as no call/no shows, disciplinary action would not be issued without review from Human Resources. In this case, the evidence was uncontroverted that the decision-maker to enforce the no call/no show discharge policy was the President of the company, Daniel Robusto.

Prior to Claimant's discharge, Mr. Casselman investigated the circumstances surrounding the no call/no show by Claimant. Mr. Casselman testified and his notes reflected that at no time did Claimant tell him that he had not been verbally advised that he was to work Saturday overtime on May 18th. Rather, he claimed that he had been scheduled for Saturday overtime as "punishment" by his supervisor and/or that he had

health problems which precluded him from working Saturday overtime. May 18th was also the date of Claimant's son's birthday.

Subsequent to his discharge from employment Claimant made a second charge of discrimination with the Michigan Department of Civil Rights on June 5, 1996 alleging that he was given a five (5) day suspension, terminated because of his race and in retaliation for filing the February 1996 Complaint. The June 1996 Complaint states in pertinent part:

> "On February 14, 1996, I filed Complaint No. 149254 alleging unfair discipline because of my race. I was issued a five-day suspension for a second no call/no show in a twelve month period on May 20, 1996. The Respondent informed me on June 4, 1996 that I was not to return to work. Others did not report for overtime on that date but were not suspended. I, a man who filled (sic) a prior complaint, believe that Respondent discharged me because of it."

Consistent with Mr. Casselman's testimony and notes, neither the charge of discrimination completed in June of 1996 nor the Michigan Department of Civil Rights Claimant Questionnaire -- Retaliation Form signed and completed by Claimant on June 5, 1996 state that Claimant was never told that he was to report for overtime on May 18th.

Testimony was presented that after Claimant's supervisor learned that he was a no call/no show on May 18th he called him lazy and said that he would get rid of that "lazy nigger". The supervisor did write him up for a no call/no show. Prior to discharge, Mr. Casselman investigated as set forth above.

While the amended charge alleges that there was a departure from "usual practice" of posting a written notice naming employees who were scheduled to work

overtime, the evidence did not substantiate that claim rather, that employees were told verbally about overtime and there was a written policy that provided that preventive maintenance overtime for Saturdays did not have to be posted. Exhibit C, IV General Section.

Claimant filed a complaint of discrimination on June 5, 1996. A Charge of Discrimination was issued on October 7, 1999 by the Department of Civil Rights. An Answer to the Charge was filed on October 7, 1999 by Respondent. An Amended Charge reflecting the appropriate corporate name of the Respondent was filed on January 5, 2000 and an Answer to the Amended Charge was filed by Respondent Keeler Brass Co., d/b/a FKI Automotive on January 13, 2000 and an Answer to the Amended Charge was filed by Respondent Dura Automotive Systems, Inc. on January 21, 2000. On July 24 and 25, 2001, a Rule 12 hearing was held before a referee. The referee issued a report finding in favor of Respondents on March 11, 2002. Neither Claimant nor Respondent has filed any exceptions or request for oral argument before the Commission.

Analysis

Claimant claims that Respondent discriminated against him on the basis of race in violation of MCL 37.2202(1)(a), which provides, in relevant part:

> "(1) An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight or marital status."

Claimant can show discrimination either by direct evidence or by indirect evidence. Hazle v Ford Motor Company, et al, 464 Mich. 456 (2001). Direct evidence is evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions. Id, relying upon Jacklyn v Schering-Plough Healthcare Products Sales Corp., 176 F3d 921 (6th Cir., 1999); Harrison v Olde Financial Corp., 225 Mich. App. 601 (1997).

In the instant action, the only direct evidence of any alleged racial animus is the statement alleged to have been made by Claimant's supervisor. The statement uses a racial epithet, calls Claimant lazy and states that he could be "gotten rid of" for having had a second no call/no show. Mr. Holliday should be admonished for using such language and under no circumstances should the use of such language ever be condoned; however, Mr. Holliday was not the decision-maker. He reported the no call/no show but the evidence is uncontroverted that the decision-maker to enforce the no call/no show policy was Mr. Robusto. Claimant presented no evidence of any racial animus or that race was a motivating factor in Mr. Robusto's decision to terminate the Claimant's employment in accordance with company policy.

The initial charge of discrimination made by Claimant in June also alleged that others did not report for overtime but were not suspended or discharged. The evidence again was uncontroverted that there were no other no call/no shows on the date in question and further evidence was submitted by Respondent that it uniformly applies its no call/no show policy. Claimant admitted that he had no knowledge of any other employee who had two or more no call/no shows within a twelve (12) month period of time and was not terminated. Thus, any claim of disparate treatment must fail.

As to Claimant's allegation that he was not told to report for mandatory overtime scheduled for May 18, 1996, the referee found no direct or indirect evidence to support this allegation. A review of the records supports the referee's findings. The facts establish that no other employee reported for the overtime in lieu of Claimant, the initial charge and paperwork completed by Claimant with the Michigan Department of Civil Rights in June of 1996 did not include any claim that he was unaware that he was supposed to report for overtime and Mr. Casselman, who investigated the incident, testified that he was never told by Claimant that he was unaware that he was supposed to report for overtime.

It is incredible to believe that if Claimant was being discharged for not showing up for an overtime assignment about which he was never told, that he would not have reported this to Mr. Casselman and included it in his June complaint and the retaliation forms he also completed in June of 1996. The fact that this claim that he did not know he was to report for overtime was only added later and is not included in any of the initial paperwork makes it highly suspect.

The amended charge also alleges that employees were to be notified in writing of overtime. However, once again, the evidence was uncontroverted that both written policy and practice was to verbally advise employees of Saturday overtime. The referee found that no credible evidence was presented by Claimant that he was discharged because of his race. The record supports this finding.

Respondent also claims that he was retaliated against for having previously filed a Charge of Discrimination in February of 1996.

The Elliott-Larson Civil Rights Act, MCL 37.2701(a) prohibits retaliation providing:

"Two or more persons shall not conspire to, or a person shall not:

(a) retaliate or discriminate against a person because the person has opposed a violation of this Act, or because a person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this Act."

To prove retaliation under the Act, Claimant must prove by a preponderance of the evidence:

(1) That he engaged in protected activity,

(2) That this was known to the defendant,

(3) That the defendant took an employment action adverse to the plaintiff, and

(4) There was a causal connection between the protected activity and the adverse employment action.

Meyer v Centerline, 242 Mich. App. 560 (2000); DeFlaviis v Lord & Taylor, Inc., 223 Mich. App. 432 (1997).

To establish causation, the plaintiff must show that his participation in protected activity under the Act was a significant factor in the employer's adverse employment action, not just that there was a causal link between the two. Barett v Kirtland Community College, 245 Mich App 306 (2001).

Clearly, the Respondent was aware that the Claimant had filed a complaint with the MDCR prior to his discharge. That pending matter was settled days before his termination. Claimant presented sufficient evidence to satisfy the first three elements of his claim of retaliation. However, the record is void of any evidence of causation with respect to the MDCR complaints, Claimant admits that he was a no call/no show on

May 18th and the record is also uncontroverted that Respondent strictly enforced the no call/no show policy. The record establishes that others who did not file Complaints with the MDCR were also terminated for having two no call/no shows in a twelve (12) month period of time. There is no evidence that this policy was not uniformly enforced. Thus, there is no evidence that Claimant having previously filed an MDCR complaint was a significant factor in the decision to enforce the no call/no show policy as it had consistently been enforced in the past. No evidence was presented to establish that the decision-maker, Mr. Robusto, took into account the previous charge, which had been settled, as a significant factor in his decision to enforce the policy. Thus, Claimant has failed to prove that he was retaliated against in violation of the Elliott-Larson Civil Rights Act.

Dr. Yahya Mossa-Basha, Commissioner

Dated: 10-7-2