

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

PRAVIN KAMDAR,

COMPLAINANT

v.

BORON OIL COMPANY,

RESPONDENT

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DOCKET NO. E-25990

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
OPINION,
RECOMMENDATION OF HEARING EXAMINER,
FINAL ORDER

FINDINGS OF FACT *

1. Complainant Pravin Kamdar is an adult individual residing at 104 Cedar Ridge Drive, McMurray, Pennsylvania. (N.T. 8)
2. Complainant was born in India; he is an East Indian Hindu who describes his color as brown. (N.T. 8-9)
3. At all relevant times Respondent Boron Oil Company has employed four (4) or more persons within the Commonwealth of Pennsylvania. (N.T. 5)
4. On July 15, 1983, Complainant filed a complaint with the Pennsylvania Human Relations Commission alleging a violation of Section 5 (a) of the Pennsylvania Human Relations Act in that Respondent suspended him indefinitely from his position as station manager because of his race, East Indian; color, brown; religion, Hindu; and national origin, Indian. (N.T. 6, 7)
5. After investigation, staff of the Pennsylvania Human Relations Commission found probable cause to credit the allegations of discrimination. The parties attempted to conciliate the matter but were unable to do so. (N.T. 7)
6. Mr. Kamdar was well qualified to perform the duties of a service station manager. (N.T. 546, 562, 607)
7. Mr. Kamdar was suspended indefinitely from his position as station manager on July 7, 1983. (N.T. 952-953)
8. Mr. Kamdar continued to violate federal wage and hour laws after being instructed repeatedly to change his payroll practices. (N.T. 667-668, 669, 671-672, 673-676, 678, 1310-1312)

* Findings of Fact are also contained in the Opinion which follows: they are those recitations of factual matters which are followed by citations to pages of the record or reference to specific exhibits.

The following abbreviations are used throughout:

N.T.	Notes of Testimony
C.E.	Complainant's Exhibit
R.E.	Respondent's Exhibit

9. The discharge of Mr. Molisee by Mr. Kamdar was viewed by Boron as an illegal retaliatory discharge. (N.T. 845)
10. There is no evidence in the record of this case which suggests that any other station manager committed what was believed by Boron management to be an illegal retaliatory discharge.
11. There is no evidence in the record of this case of any other manager continuing to violate federal wage and hour law after repeatedly being instructed not to do so, in a pattern similar to the actions of Mr. Kamdar.
12. Mr. Kamdar's testimony taken as a whole was not credible.

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission ("Commission") has jurisdiction over the parties and subject matter of this case.
2. The parties and the Commission have fully complied with the procedural prerequisites to a public hearing in this case.
3. Complainant is an individual within the meaning of the Pennsylvania Human Relations Act ("Act").
4. Respondent is an employer within the meaning of the Act.
5. Complainant in this case has made out a prima facie case by proving that:
 - a. He belongs to a protected class;
 - b. He was performing duties which he was qualified to perform; and
 - c. He was discharged from his position.
6. Respondent has met its burden and rebutted Complainant's prima facie case by introducing admissible evidence of legitimate, nondiscriminatory reasons for its conduct.
7. Complainant has not established that the reasons given by Respondent for its actions were pretextual.

OPINION

This case arises on a complaint filed by Pravin Kamdar ("Complainant") against the Boron Oil Company¹ ("Respondent") with the Pennsylvania Human Relations Commission ("Commission") on or about July 15, 1983, at Docket No. E-25990D. Mr. Kamdar alleged that he had been indefinitely suspended from his position as manager of a Boron service station because of his race, East Indian; color, brown; religion, Hindu; and national origin, Indian. (The parties have consistently condensed this cluster to the statement that Mr. Kamdar is Indian, and this opinion will do likewise.) He alleged a violation of Section 5 (a) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744 as amended, 43 P.S. §§951 et seq. ("Act"). Boron has throughout these proceedings denied any violation of the Act.

Commission staff after investigation found probable cause to credit the allegations of discrimination. The parties and the Commission thereupon attempted to eliminate the allegedly unlawful practice through conference, conciliation and persuasion. These attempts were unsuccessful, and the case was approved for hearing. A public hearing was held on February 3, 4, 5, 6, 7, 11 and 12, 1986, in Pittsburgh, Pennsylvania, before Hearing Examiner, Edith E. Cox.

¹Boron is a subsidiary of the Standard Oil Company of Ohio ("Sohio"). For purposes of this hearing, Boron and Standard Oil are synonymous. Although certain individuals mentioned below are actually Standard Oil employees, for the sake of simplicity this opinion will refer only to Boron. (N.T. 777-778).

Mr. Kamdar is a Hindu of East Indian descent. (N.T. 8) He came to the United States from India in 1969, sponsored by his brother who was already here. (N.T. 9) He attended automobile mechanic school beginning in 1970, and after completing that training, worked in various automobile related concerns, including service stations, mainly as a mechanic. (N.T. 10-18)

In late 1975 or early 1976, in response to a newspaper advertisement, Mr. Kamdar applied to Boron for a position as a service station manager. (N.T. 18) A Boron supervisor, John Perko, called Mr. Kamdar for an interview. (N.T. 20) After a number of meetings, at least one of which involved another Respondent official, Mr. Kamdar was offered a station manager job by Mr. Perko. (N.T. 21, 27) He accepted, and initially attended a two-week training program in Columbus, Ohio, which was required for all new station managers. (N.T. 21-22, 120-121, 648)

Upon successfully completing the training program, Mr. Kamdar returned to western Pennsylvania and was assigned to the position of service station manager at a Boron station in Heidelberg. (N.T. 28) Mr. Perko worked with him for his first two weeks on the job, orienting him and assisting him with problem areas, notably bookkeeping. (N.T. 544-545) By all accounts Mr. Kamdar adjusted well and managed the station successfully, so successfully that, after four years at Heidelberg and a brief stint at another station, he was in 1980 made manager of a high volume station on Racetrack Road in Meadowlands, Pennsylvania. This station operated around the clock, seven days a week. (N.T. 54-59) At this station Mr. Kamdar was able to substantially increase his earnings: he was an "I Manager" (Incentive Manager), earning a base salary plus a commission on all gasoline, oil, parts and labor sold at

the station, less the wages be paid to the station's employees. (N.T. 38-39, 147-150) He thus had incentive to both boost sales and reduce his payroll, as his own earnings were reduced directly by each dollar paid out in wages to his employees.

Mr. Kamdar continued to be highly successful. He remained under the supervision of Mr. Perko, who testified that from the beginning he had been an extremely competent manager, accurate and well organized in all of his record keeping. (N.T. 546) Early in 1982 an article was published by Boron about Mr. Kamdar's performance at the Meadowlands station. Admitted to the record as Complainant's Exhibit 19, the article described in glowing terms Mr. Kamdar's record breaking sales, his popularity with customers, his good employee relations and his spotless station. Around the time this article appeared, Mr. Kamdar's problems began.

Mr. Kamdar's station was visited by Mr. Perko at least once a week, more often if some problem required additional attention. (N.T. 547) At least once a year, Boron auditors visited the station and thoroughly reviewed its records, apparently focusing on inventory and sales records. (N.T. 559-560) In February of 1982 this audit process disclosed a \$1,924 shortage in Mr. Kamdar's soft drink sales. A repeat audit in July of 1982 detected a \$2,423 shortage in soft drink sales and a general cash shortage of \$3,090. It was noted that Mr. Kamdar had put three of his own personal checks totalling roughly \$4,500 in with the station deposits, one of which came back with a missing signature and two of which were returned for insufficient funds. (N.T. 658-662) By letter dated July 14, 1982, admitted to the record as Respondent's Exhibit 8, Mr. Perko summarized these matters, advised Mr. Kamdar that all involved violations of company policy, and warned that further violations could lead to termination.

The letter further advised of a violation of company policy in failing to report to either local police or the company a robbery which Mr. Kamdar said had occurred on June 1, 1982, until June 9, 1982, even though Mr. Perko had had lunch with Mr. Kamdar on June 2, 1982, and had visited his station the following day.² None of these incidents were disputed by Mr. Kamdar at hearing or, apparently, in July of 1982.

Boron in the meantime was having problems of its own. Sometime between the Spring and Fall of 1982 (the record is not entirely clear), the company became aware that a number of its stations in western Pennsylvania were being investigated by the Department of Labor ("DOL") for possible violations of federal wage and hour laws. (N.T. 782) Seven stations were initially involved, one of them Mr. Kamdar's. (N.T. 1153)

Two general sorts of violations were under investigation. The first involved paying employees less than the minimum wage of \$3.44 hourly (actually \$3.35 plus a \$.09 uniform cleaning allowance). Specifically, certain managers were accused of deducting cash shortages from employees and thereby bringing them below minimum wage. (N.T. 554-556, 585) (Deducting shortages was not in and of itself prohibited, so long as the employee's wage did not fall below minimum.) A company payroll computer was programmed to ensure that all employees received minimum wage; however, by recording the shortage in column L ("minus adjustments") rather than column M ("minus shortage") of the weekly payroll sheet, managers could circumvent the computer. (N.T. 554, Complainant's Exhibit 1.)

²Mr. Kamdar after a polygraph examination was absolved of any responsibility in connection with this incident; Boron did not at any time suggest that the incident contributed to the decision to terminate him. (N.T. 605)

The second sort of violation involved not paying time-and-a-half for all hours worked over forty per week. In some cases payments for extra time worked were recorded as commissions, and an additional eight hours' work would be compensated at the regular rate, recorded as a commission. In others, workers entitled to overtime would be placed on salary and compensated without regard to the number of hours worked. Workers required to work past their quitting time to balance that shift's receipts would not be paid for the extra time, even if it took them over an hour to complete the task. (N.T. 586-587, 589, R.E. 9)

By the late Fall of 1982 Boron had begun to take steps to ensure that all of its stations were in compliance with federal law. A memorandum dated November 17, 1982, from Duane Myers, Retail Division Manager, instructed all supervisors to institute a number of payroll procedures for station managers. Admitted to the record as Respondent's Exhibit 9, the memorandum prohibits paying commissions in lieu of overtime, paying salaries, and deducting shortages in amounts which take an employee below minimum wage. Other instructions involve record keeping. The exhibit includes a handwritten list of numbers and dates, corresponding to the stations under Mr. Perko's supervision and the dates on which he reviewed the memorandum with them. Mr. Kamdar's signature appears beside his station number along with a notation that he had been paying salary to a Mr. Riggins. Mr. Perko testified that only Mr. Kamdar was required to sign because only Mr. Kamdar was doing something (paying a salary) which he had been previously told by Mr. Perko not to do. (N.T. 667-668) Mr. Perko testified credibly that he went over each item of the memorandum with Mr. Kamdar, who expressed no confusion about any of them. (N.T. 668)

Under increasing pressure from the Department of Labor, Boron also agreed to conduct a self-audit of its certain stations to determine how many managers during 1982 had paid commissions in lieu of overtime. A memorandum dated December 13, 1982, from William F. Deitrich, Mr. Perko's supervisor (and supervisee of Mr. Myers), instructs all supervisors in his area to complete this audit by January 31, 1983. Admitted to the record as Respondent's Exhibit 10, the memorandum has a list of crossed-off numbers corresponding to the stations under Mr. Perko's supervision. Mr. Perko testified credibly that he had reviewed the memorandum with each manager, including Mr. Kamdar, and that again no misunderstanding about paying commissions was expressed by Mr. Kamdar. (N.T. 672)

On December 22, 1982, Mr. Perko held a meeting for all managers under his supervision and once again reviewed the prohibition against paying commission in lieu of overtime and the requirement of paying minimum wage. Mr. Deitrich also attended that meeting. (N.T. 673-674)

In spite of this instruction, when Mr. Perko visited Mr. Kamdar's station in January of 1983 he discovered that January's time sheets listed commissions paid to two employees including the "midnight man" who Mr. Kamdar admitted was working midnight shift seven days a week even though the time sheets reflected only a forty hour week. (N.T. 674) A letter from Mr. Perko summarizing the ensuing discussion was admitted to the record as Respondent's Exhibit 11. The letter, incorrectly dated February 11, 1982, instead of 1983, concludes:

So, again, I informed you that you were violating the Federal Labor laws, even though I told you weeks ago that your station was being investigated for similar violations.

What must I do to get you to operate your station within the limits of the law? These illegal practices

are going to cost you hundreds of dollars, and could result in your being terminated as a Boron manager.

Also, unbeknownst to Boron, Mr. Kamdar had been visited by a Department of Labor investigator and had given a statement, signed by him and dated December 27, 1982, five days after the mandatory managers' meeting. A copy of the statement, admitted to the record as Complainant's Exhibit 5, says that the night attendant is on salary, shortages are deducted from workers earning \$3.50 hourly, hourly workers receive no overtime for hours worked over forty. Its concluding paragraph states: "All of the above pay practices are my responsibility. The main office nor the supervisor do not tell me how to pay my employees. I determine how to pay people, I schedule their hours, I take the shortages from their pay." The statement was eventually brought to Boron's attention, but not for several more months.

In April of 1983, a dispute arose between Mr. Kamdar and one of his employees, Frank Molisee, which resulted in Mr. Molisee's termination. Mr. Molisee's testimony, which I credit, was that Mr. Kamdar had continued to deduct shortages from hourly employees; in order to avoid detection he was now requiring employees to cash their paychecks and give him cash on the spot. (N.T. 1310-1311, 1316-1317) Two payments were demanded from Mr. Molisee, one of \$15.00 and one of \$50.00. (N.T. 1312-1315) Mr. Molisee made the payments, believing that he would be fired if he did not; however, in 1982 he had been interviewed during the DOL investigation, and had become aware that he was entitled to minimum and time-and-a-half for overtime. (N.T. 1307-1309, 1313) Deduction of shortages had become a topic of heated discussion among Mr. Kamdar's employees by then. Shortly thereafter Mr. Kamdar demanded a cash shortage payment from another employee, Michael Patrick, who gave it to him but requested a receipt (which Mr. Kamdar declined to give him). Mr. Molisee

walked into the office and jokingly asked Mr. Kamdar why he would not give Mr. Patrick a receipt. (N.T. 1320) Mr. Kamdar seemingly was not amused, and when Mr. Molisee called in a few days later to check on his upcoming work schedule, Mr. Kamdar discharged him. (N.T. 1319)

Mr. Molisee thereupon called both the Department of Labor and two Boron representatives, Mr. Perko and William Lee in the company's Human Resources Department, complaining about his discharge and the fact that shortages were still being deducted from him and from other employees. He requested a meeting with Boron to discuss his discharge. (N.T. 1320-1321)

That meeting was held on April 13, 1983, with Messrs. Molisee, Kamdar, Perko and Deitrich in attendance. Mr. Molisee told Mr. Perko and Mr. Deitrich that shortages were still being taken from him and from other employees. (N.T. 1323) He expressed his belief that his discharge was related to his complaints about the deductions, and to Mr. Kamdar's perception that he was not going to take a lot more of it. (N.T. 1325) The only immediate result of the meeting was that Mr. Molisee was advised by Mr. Deitrich to apply for unemployment compensation; he did so, and received benefits, apparently without opposition from Boron. (N.T. 1330-1331)

At about this same time, various Boron officials, including labor attorney John Simonetti, were preparing to meet with the Department of Labor. A meeting was held in Pittsburgh on April 20, 1983, attended by Mr. Simonetti, Carmen Slominski and Bill Lee from Boron's Human Resources Department, Mr. Myers, Mr. Deitrich, and a Mr. Linkosky from the Department of Labor. (N.T. 924) Mr. Simonetti, called as Complainant's witness, testified at length about this meeting and the subsequent events which culminated in Mr. Kamdar's discharge.

Mr. Simonetti testified that the Boron Group went into the meeting prepared to present the results of the self-audit. His uncontradicted testimony was that Mr. Linkosky "exploded", telling them that their people were continuing to violate federal law but now hiding it, using what he (Mr. Linkosky) had told them to escape detection. (N.T. 924-925) He then went over the results of the Department's investigation of each of the seven stations, including Mr. Kamdar's. Two items unique to Mr. Kamdar emerged: continuing deduction of shortages, now taken in cash to avoid detection, and the discharge of Mr. Molisee, said by Mr. Linkosky to be because Mr. Molisee had complained about deduction of shortages and thus to be an illegal retaliatory discharge. (N.T. 926) Mr. Simonetti's uncontradicted testimony was that, while other stations had had violations, these last two allegations were made only about Mr. Kamdar. (N.T. 926)

At the conclusion of the meeting, Mr. Linkosky discussed a number of alternatives: Boron could audit a group of 175 of its stations and pay all back wages found to be owing; DOL could audit perhaps ten stations and require Boron to pay to all employees the average found to be owed to employees of the ten stations; or DOL could institute a class action against Boron, similar to another he mentioned where liability had been in the neighborhood of \$2,000,000. (N.T. 927)

After the meeting the Boron group had lunch together. Mr. Simonetti questioned Mr. Deitrich about the Molisee discharge. Mr. Deitrich indicated that he had listened to both sides, that Mr. Kamdar admitted taking \$50.00 from Mr. Molisee, and that basically he (Mr. Deitrich) did not intend to take action. (N.T. 930-931) Mr. Simonetti was however more concerned; while driving back to their offices in Cleveland he indicated to Ms. Slominski and Mr. Lee that ". . . were in big trouble with this Molisee business. . ."

(N.T. 932), and expressed his belief that ". . . in the mind of a government agent, there is almost nothing worse than a retaliatory discharge. . ." (N.T. 933) Mr. Lee indicated that he had had a report from Mr. Perko about it, and later forwarded to Mr. Simonetti Respondent's Exhibit 6, Mr. Perko's report. (N.T. 932) The report summarized Mr. Kamdar's difficulties with Boron from the 1982 cash shortages through the April 1983 complaints from Mr. Molisee.

Upon returning to Cleveland Mr. Simonetti notified Taylor Bassett, Mr. Myers' boss and chief of retail operations for a large part of the north-east, about the DOL problems, chiefly the possibility of a major class action; it was agreed that action had to be taken to avert that lawsuit. (N.T. 933-934) Mr. Simonetti contacted outside counsel, a Mr. Barnard, and armed with Mr. Barnard's suggestions arranged a second meeting with Mr. Linkosky. (N.T. 934) This took place on May 26, 1983, attended only by Mr. Simonetti, Ms. Slominski, and Mr. Linkosky. (N.T. 937)

A number of things occurred at this meeting. Mr. Simonetti outlined several positive steps the company intended to take, including training programs and posting of notices. (N.T. 937) And each of the seven investigated stations was discussed in detail, with DOL's documentation of alleged violations being produced by Mr. Linkosky. (N.T. 938) Mr. Kamdar's December, 1982, statement admitting to numerous violations was read to them. (N.T. 939) Mr. Linkosky again brought up the continuing deduction of cash shortages, and became angry while discussing these issues. (N.T. 940) The meeting ended in something of a stalemate, with Mr. Linkosky still demanding a massive audit and threatening to initiate a class action, and Mr. Simonetti indicating that certain positive steps would be taken, not however including a mass audit. (N.T. 946-947)

Back in Cleveland, Mr. Simonetti again conferred with Mr. Bassett and Mr. Barnard. It was determined that additional steps were necessary, including payment of all back wages found to be owing due to the violations detected by Boron's self-audit and discovered by DOL. (N.T. 947) It was also determined that Mr. Kamdar had to go. Mr. Simonetti made that recommendation to Mr. Bassett, who agreed. (N.T. 948) Before action could be taken, word was received that Mr. Kamdar would resign at the end of June, and it was decided to wait and accept his resignation. (N.T. 949)

Mr. Kamdar's resignation was however not forthcoming. On July 7, 1983, Ms. Slominski called Mr. Simonetti to inform him that Mr. Kamdar had been at a managers' meeting which she attended that day. (N.T. 952-953) Mr. Bassett was notified. That evening, Mr. Kamdar was suspended indefinitely. (N.T. 952-953) The sole question presented by this case is whether that suspension (which has had the effect of a termination) violated the Act.

The respective burdens of proof of the parties in cases brought under the Act are well settled. Complainant bears the initial burden of making out a prima facie case. Should he do so, Respondent must rebut the inference of discrimination thus created by setting forth through the introduction of admissible evidence the legitimate, non-discriminatory reason(s) for their conduct. Complainant may then still prevail by proving that the proffered reasons were pretextual. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973); General Electric Corp. v. Pennsylvania Human Relations Commission, 365 A.2d 649 (1976).

The prima facie case is based on evidence introduced by the Complainant. Should a Respondent remain silent in the face of that evidence, judgment

must be entered for the Complainant. Where evidence of a Respondent's reason for its action is received, the Complainant's burden of establishing a prima facie case merges with his ultimate burden of persuading the trier of fact that there was intentional discrimination. Burdine, supra. In that situation, where a Respondent has done all that would have been required of it had the Complainant properly made out a prima facie case, it is no longer relevant whether the Complainant did so; the trier of fact should then decide the ultimate question of whether or not discrimination occurred. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983).

McDonnell-Douglas, setting out the elements of a prima facie case of refusal to hire, noted that differing factual situations would call for variation in the elements. 411 U.S. at 802, n. 13. Pennsylvania courts have similarly recognized the need for flexibility. Reed v. Miller Printing Equipment Division, 75 Pa. Commonwealth 360, 462 A.2d 292 (1983). In this case Mr. Kamdar has made out a prima facie case by proving that:

1. He belongs to a protected class;
2. He was performing duties which he was qualified to perform; and
3. He was discharged from his position.

Phillips v. United Brotherhood of Carpenters, 598 F.Supp. 40 (E.D.Ark. 1985); Johnson v. Bunny Bread Co., 646 F.2d 1250 (8th Cir. 1981); Osbourne v. Cleveland, 620 F.2d 195 (8th Cir. 1980).

The parties agree that Mr. Kamdar, of Indian national origin and ancestry, is protected from discrimination on those bases by Section 5 (a) of the Act. Based on the testimony of Mr. Perko I find that he was qualified, indeed highly qualified, to perform the duties of a service station manager. Finally, while the indefinite suspension of July, 1983, has seemingly never

been officially converted to a termination, the effect has been the same: Mr. Kamdar's employment relationship with Boron has ended, and it was abundantly clear at hearing that Boron does not intend to voluntarily reemploy him. It is therefore necessary to consider the company's explanation of events.

As explained above, Respondent's burden is the light one of introducing admissible evidence of a legitimate, non-discriminatory reason for its conduct. The reasons given, which were amply supported by the record, were concisely stated by Mr. Simonetti during cross-examination:

He had continued to violate [federal wage and hour laws] after having been warned and warned again.

He had committed a cardinal sin in that he had discriminatorily discharged an individual because he had complained in retaliation under the [federal] Act.

(N.T. 953)

The record in this case includes numerous instances of Mr. Kamdar continuing to violate federal law after repeated instructions to change his payroll practices; most of these have already been mentioned. In addition, Mr. Simonetti testified credibly to his belief that the Molisee discharge could be viewed as an illegal retaliatory act, and was seen as such by DOL. (N.T. 845) That this concern was both genuine and shared by Boron management is born out by the fact of Mr. Molisee's reinstatement. This was done on Mr. Simonetti's advice, based on his belief that DOL had sufficient grounds to allege an illegal retaliatory discharge. (N.T. 845) In order to ensure reinstatement at an equivalent wage, the company supplemented the amount paid to Mr. Molisee by the difference between minimum wage and the \$4.00 per hour that Mr. Kamdar had paid him; this arrangement continued to the time of the hearing in this case. (N.T. 773)

Respondent has therefore produced admissible evidence of legitimate reasons for discharging Mr. Kamdar. As noted, Complainant may still prevail by showing that this reason was pretextual. In attempting to do this, he points to two sorts of evidence: direct evidence of discriminatory animus, and comparative evidence designed to show that he was treated more harshly than other managers whose conduct had been similar. For the reasons which follow, neither is sufficient to demonstrate pretext.

It is not disputed that Mr. Kamdar was the only Indian service station manager employed by Boron in the area supervised by Mr. Deitrich in 1982-1983, an area including western Pennsylvania and the West Virginia pan-handle which had approximately one hundred and eighty service stations, and the target area of DOL's investigation. (N.T. 734-735) It is also not disputed that many other managers were found to have committed violations of federal wage and hour laws, but that only Mr. Kamdar was terminated, and that he was replaced by a Mr. Murphy, who is white. (N.T. 617-618, 738-739) However, significant factors other than his ancestry and national origin distinguish Mr. Kamdar from those other managers.

First, no other manager committed what Mr. Simonetti described as the "cardinal sin" (N.T. 953), a retaliatory discharge. Mr. Simonetti testified repeatedly and without contradiction to that effect; Complainant produced absolutely no evidence to the contrary. (N.T. 921, 953)

Second, this record does not establish that any other manager continued to violate federal law with his payroll practices after the numerous and explicit warnings unquestionably received by Mr. Kamdar. The lengthy history recited above includes explicit instructions repeatedly given throughout November and December of 1982 and January of 1983, and credible evidence

that these were received, understood, and ignored by Mr. Kamdar. There is simply not evidence sufficient to establish a similar pattern involving any other manager. At best the record contains hints that other managers might have continued to violate after January of 1983. These managers however are not named, their national ancestry is not specified, their illegal practices are not identified, and there is no proof that they received written warnings and instructions of the sort received by Mr. Kamdar and made exhibits at this hearing. Even without regard to the retaliatory discharge issue, this record does not establish that the situation of any other manager was similar to that of Mr. Kamdar.

Rather than addressing this deficiency, Complainant's brief focuses on the process used by the company in dealing with him, repeatedly claiming that no investigation of the charges against him was conducted and questioning the delay in deciding to terminate him. The claim of lack of investigation simply ignores the fact that the company by the Spring of 1983 had a great deal of information about Mr. Kamdar's activities, obtained through various channels including its own supervisory personnel. The fact that the decision to suspend Mr. Kamdar was made in May or early June and not carried out until July of 1983, is explained by credible testimony of Mr. Perko and Mr. Simonetti to the effect that the company believed that Mr. Kamdar's resignation was imminent or had been obtained.

Nor is Mr. Kamdar's supposed direct evidence of discriminatory animus sufficient to prove pretext. He testified that Mr. Perko referred to him as a "dumb Indian" and "chief". Mr. Perko's testimony denying the former and indicating that the latter, if he said it, meant "boss", was credible. (N.T. 562, 565-567) The record as a whole in fact establishes that Mr. Perko

was supportive of Mr. Kamdar and was probably the only reason he remained in Boron's employ for as long as he did.

More significantly, Mr. Kamdar's testimony on this and most other issues lacked credibility. During an exhaustive cross-examination he repeatedly contradicted himself; much of his testimony was inherently incredible, such as the claim that he learned for the first time in July of 1983 that he had to pay overtime for hours worked over forty each week. (N.T. 236, 315) This testimony was later contradicted when he acknowledged that a DOL investigator had advised him of overtime requirements in December of 1982. (N.T. 392-393)

Similarly, on direct-examination Mr. Kamdar testified that he had read the company service station manual, which outlined numerous required payroll and other procedures. (N.T. 48) On cross-examination he denied having read it. (N.T. 142) Asked if he had ever reduced an employee's hourly rate, he denied having done so, but immediately changed his testimony when confronted with payroll sheets (Complainant's Exhibits 7 and 8) which reflected a reduction. (N.T. 239-241) The record is replete with similar examples.

Mr. Kamdar's other allegation of discriminatory animus involved Mr. Deitrich, who he claimed ordered him to stop burning incense in his office and to remove from that office a framed picture of an Indian goddess; both were part of his daily religious observance. Mr. Deitrich credibly denied ordering the picture to be removed. (N.T. 764) He admitted ordering Mr. Kamdar to stop burning incense but indicated this was because of a customer's complaint and out of concern for the danger of fire. (N.T. 744) Moreover, it is not disputed that the decision to suspend Mr. Kamdar came, not from Mr. Deitrich, but from his superiors in Cleveland, on consultation with Mr. Simonetti. (N.T. 766)

To summarize, Complainant has failed to establish that the non-discriminatory reasons given by Respondent for his discharge were pretextual. Those reasons therefore rebut his prima facie case of discrimination, and his complaint must be dismissed. An appropriate order follows.

