

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Ann M. Soltis,

Complainant,

v.

Metropolitan Training and Consulting,

Respondent.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson on May 8, 9, and 17, 1996, in Courtroom 3 of the Office of Administrative Hearings, 100 Washington Square, Minneapolis, Minnesota, 55401. The record closed on September 16, 1996, upon receipt of the parties' post-hearing memoranda.

J. Thomas Church, Esq., 4700 Norwest Center, Minneapolis, Minnesota 55402, appeared on behalf of Ann Soltis ("Complainant"). Harold LeVander, Jr., Esq., Maun & Simon, 2300 World Trade Center, 30 East 7th Street, St. Paul, Minnesota, 55101-4904, appeared on behalf of Metropolitan Training and Consulting ("Respondent").

NOTICE

Pursuant to Minn. Stat. § 363.071, subd. 2 and 3, this Order is the final decision in this case. Under Minn. Stat. § 363.072, the Commissioner of the Department of Human Rights or any person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. §§ 14.63 to 14.69.

STATEMENT OF ISSUES

This case presents the following issues:

1. whether Respondent's transfer of Complainant to Phoenix Management was an adverse employment action constituting reprisal in violation of the Minnesota Human Rights Act, Minn. Stat. § 363.03, subd. 7;

2. whether Complainant is entitled to compensatory damages, damages for mental anguish and suffering, punitive damages, and attorney's fees and costs;
3. whether a civil penalty is appropriate in this case; and
4. whether it is appropriate to order reimbursement to the Department for litigation and hearing costs.

Based upon all of the files, records, and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Respondent, Metropolitan, Training & Consulting Company ("MT&C"), provides management training and consulting services to business in the metropolitan area. MT&C was organized in 1991. At that time, MT&C was one of a number of corporations owned and operated by CEO Thomas Grossman. The other corporations included five automobile dealerships, a financial services company, and a management company. Mr. Grossman has been in business for over 25 years. Testimony of Grossman.

2. At present the corporations owned and operated by Mr. Grossman together have 550 employees. Five hundred employees work for the automobile dealerships, which account for almost 95 percent of the total corporate revenues. Ten employees work for the financial services company which accounts for four to five percent of total corporate revenues. Seven or eight employees work for MT&C which accounts for approximately one-half of one percent of total corporate revenues. Fifteen employees now work for the management company, Phoenix Management, Inc., which accounts for less than one percent of total corporate revenues. Testimony of Grossman. MT&C was described during the time period of Complainant's employment as a branch of a \$16.7 million company. Testimony of Soltis.

3. In 1992, MT&C through Mr. Grossman hired Rick Conlow as its vice president and general manager. Prior to this position, Mr. Conlow managed a customer satisfaction and management training program for Mr. Grossman's automobile dealerships. Mr. Conlow's general responsibilities at MT&C were to develop training programs, identify potential customers, sell and deliver the training programs to the customers, follow up with the customers after conducting the programs to assure customer satisfaction, and manage the daily operations of the company. Testimony of Grossman and Conlow.

4. In mid-1992, Mr. Grossman decided to reorganize the various financial, computer, and clerical functions of his different companies into one management company. This newly formed company was called Phoenix Management, Inc. Mr. Grossman intended that Phoenix Management would perform the financial, accounting, computer and clerical work for all of the operating companies rather than each operating company performing these functions separately. Testimony of Grossman.

5. In August of 1992, Mr. Conlow hired Leonard Erickson as a corporate sales consultant for MT&C. Previously, Mr. Erickson had worked at Mr. Grossman's automobile dealerships in sales and as a trainer. Mr. Erickson was paid a salary of \$2,500 per month and received a five percent commission on sales. When Mr. Erickson was hired, he requested and received a draw against his commissions of \$500 per month. Testimony of Conlow and Erickson.

6. In September of 1992, Mr. Conlow hired Lynne Dale as a corporate sales consultant. Ms. Dale had no prior experience in management training. She was paid a salary of \$2,500 per month and a five percent commission on sales. At the time she was hired, Ms. Dale did not know that it was possible that MT&C would give employees a monthly draw against commissions. She did not request and was not given a monthly draw. Testimony of Conlow and Dale.

7. Later in September of 1992, Mr. Conlow also hired Complainant, Ann Soltis, as a "Customer Satisfaction Assistant" at the rate of \$6.50 per hour. Ms. Soltis is a 42-year-old woman with a background in nursing and experience in workers' compensation claims, nursing home administration, cleaning service owner-employee, and general office work. She first met Mr. Conlow after she heard him speak at a time management seminar and requested to hold an informational interview with him. Ms. Soltis and Ms. Dale were friends. Ms. Soltis originally told Ms. Dale to contact Mr. Conlow when she learned that he had openings for sales consultants and Ms. Dale told Ms. Soltis to contact Mr. Conlow about a clerical position. Testimony of Soltis and Conlow.

8. During the relevant time frame in this matter, the only employees of MT&C were Mr. Conlow, Mr. Erickson, Ms. Dale, and Ms. Soltis.

9. Ms. Soltis' position as a Customer Satisfaction Assistant was both administrative and clerical in nature. Ms. Soltis worked largely independently due to Mr. Conlow being out of the office approximately fifty percent of the time. Her duties consisted of compiling and reviewing customer complaints from the automobile dealerships; answering the phone; responding to customer inquiries; typing correspondence and sales proposals; organizing and attending meetings and seminars; assisting sales consultants in drafting proposals; maintaining a mailing list data base and sales prospecting records; distributing sales leads to the consultants as provided by Mr. Conlow; producing weekly sales reports with tallies of sales figures; maintaining files; and handling administrative support duties as assigned by Conlow. Complainant would also attend the weekly sales meetings with Mssrs. Conlow and Erickson and Ms. Dale. Ms. Soltis did most of the typing for the office, but would occasionally request help from "Missy," a secretary in another Grossman corporation. Ms. Soltis' position kept her busy and she frequently worked through her lunch hour. Mr. Conlow considered Ms. Soltis to be proactive, a good worker, and part of the MT&C team. He allowed Ms. Soltis to expand her job duties and set up office procedures. Exhibits 1, 6, and 7; Testimony of Soltis and Conlow.

10. Prior to accepting the position, Ms. Soltis told Mr. Conlow that her goal was to eventually become a management trainer and public speaker. Ms. Soltis viewed the customer satisfaction assistant position as a way to get her foot in the door of a growing company. Mr. Conlow told Ms. Soltis that she needed to have sales experience before

she could be a public speaker. Mr. Conlow did not promise Ms. Soltis that she would become a trainer, but he did indicate that once MT&C started making more money he would hire more clerical staff and Ms. Soltis could move up into sales. Testimony of Soltis and Conlow.

11. Toward the end of 1992, Ms. Soltis asked Mr. Conlow if she could use the title of "Administrator" for her job. Mr. Conlow agreed to allow Ms. Soltis to use the title "Administrator" with customers and to have business cards printed with the title "Administrator." Ms. Soltis passed these business cards out at MT&C training seminars and "showcases." "Showcases" were marketing events organized by MT&C to promote its training products and services to potential customers. During her employment, Ms. Soltis organized one showcase. Her duties included reserving the hotel conference room; mailing invitations and packets of material; printing and copying information; and registering attendees on the day of the event. At the showcase and at training seminars, Mr. Conlow would introduce Ms. Soltis as his assistant or associate and direct people to talk to Ms. Soltis if they had any questions about MT&C. Testimony of Soltis and Conlow.

12. Between October of 1992 and April of 1993, Ms. Soltis attended approximately eleven management training seminars. Each seminar lasted approximately three hours. Exhibits 14 - 21; Testimony of Soltis.

13. In November of 1992, Ms. Dale became aware that Mr. Erickson had a draw against commissions. Ms. Dale asked Mr. Conlow for a draw against commissions. Mr. Conlow conveyed Ms. Dale's request to Mr. Grossman. Mr. Grossman denied Ms. Dale's request for a draw against commissions. Testimony of Dale and Conlow.

14. Starting in approximately December of 1992, Ms. Soltis began to complain to Mr. Conlow about what she perceived to be Lennie Erickson's poor work habits. Ms. Soltis specifically contrasted Mr. Erickson's work habits with those of Lynne Dale. Ms. Soltis believed that Ms. Dale worked harder and sold more training services than Mr. Erickson, but that Ms. Dale received less encouragement and support from Mr. Conlow. In addition, Ms. Soltis believed that Mr. Erickson was allowed to be gone from the office much more frequently than Ms. Dale and that Mr. Erickson was often gone on personal business. Mr. Conlow told Ms. Soltis not to worry about Mr. Erickson. Mr. Conlow never spoke to Mr. Erickson about Ms. Soltis' concerns. Testimony of Soltis and Erickson.

15. Toward the end of 1992, Mr. Conlow submitted a business and organizational forecast of MT&C to Mr. Grossman for the upcoming year 1993. In his forecast, Mr. Conlow projected hiring additional sales consultants and additional trainers based on anticipated volumes of business. Mr. Conlow also projected hiring two additional secretaries in the first and second quarter and promoting Ms. Soltis to the administrative position of Office Manager. Exhibit 2; Testimony of Conlow and Soltis.

16. In early 1993, Mr. Grossman rejected Mr. Conlow's expansion forecast of MT&C's office staff. While Mr. Grossman approved the hiring of additional sales consultants and trainers, Mr. Grossman believed that MT&C's limited revenues and workload did not justify Mr. Conlow's request for more secretarial staff. In addition, Mr.

Grossman informed Mr. Conlow that he was planning on reorganizing his companies' clerical functions into one management company. Testimony of Conlow and Grossman.

17. On January 1, 1993, Ms. Soltis received a pay increase of 50 cents per hour to \$7.00 per hour. Testimony of Soltis.

18. By early 1993, Phoenix Management was up and running and on payroll. Testimony of Grossman.

19. By March of 1993, Mr. Grossman began moving the majority of the financial, accounting, computer, and clerical functions of the companies he owned and operated to Phoenix Management. The services transferred to Phoenix ranged from sophisticated financial and management operations (Mr. Grossman's position as CEO, the chief financial officer's position, payroll, tax preparation, computer service supervisors) to basic clerical functions. By some point prior to June 21, 1993, clerical functions from the automobile dealerships and financial services functions were transferred to Phoenix Management. Testimony of Grossman. The clerical employees transferred to Phoenix were to work in a typing pool serving all of the companies operated by Mr. Grossman. Testimony of Soltis, Grossman, and Conlow.

20. In April of 1993, Jim Lowe began working at MT&C in an advisory capacity as a "trouble shooter" and consultant. Mr. Lowe had previously worked for Mr. Grossman's automobile dealerships. Testimony of Conlow and Grossman.

21. Shortly after Mr. Lowe started working at MT&C and prior to May 21, 1993, Mr. Lowe took over Ms. Soltis' duty of assigning leads to the sales consultants. Mr. Lowe did not always follow Ms. Soltis' system of distributing the sales leads to Ms. Dale and Mr. Erickson on an alternating basis. Testimony of Soltis and Conlow.

22. On May 21, 1993, at a sales meeting attended by Ms. Soltis, Ms. Dale, Mr. Erickson, Mr. Conlow, and Mr. Lowe, Ms. Soltis brought up the issue of what she perceived to be the unequal treatment of Ms. Dale. In particular, Ms. Soltis mentioned that Mr. Erickson was allowed to spend a day shopping for a new car while Ms. Dale stayed at the office working and couldn't afford a new car. At this point, Ms. Soltis was cut off by Jim Lowe who became upset, said that it was none of Ms. Soltis' business if Lennie bought a car, and walked out of the meeting. Mr. Conlow adjourned the meeting a few minutes later. Testimony of Soltis, Conlow, Dale and Erickson.

23. After the meeting, Mr. Conlow reported Ms. Soltis' comments to Mr. Grossman. Testimony of Conlow.

24. After speaking with Mr. Conlow, Mr. Grossman called Ms. Soltis into his office. Steve Huston, the controller, was also present. Mr. Grossman told Ms. Soltis that her accusations of discrimination were very serious and could hurt their small organization. Mr. Grossman asked Ms. Soltis to tell Ms. Dale to speak to him directly if she had a problem with how she was treated. Ms. Soltis agreed to convey this message to Ms. Dale. During this meeting, Mr. Grossman raised his voice, yelled at Ms. Soltis and appeared visibly angered and upset. Ms. Soltis told him to stop yelling at her, and he did. Ms. Soltis felt intimidated by Mr. Grossman during this meeting and was not sure what he was going to do. Exhibit 4; Testimony of Soltis and Grossman.

25. A few days after the May 21, 1993 sales meeting, Ms. Soltis was relieved of the responsibility of gathering and tallying the consultants' sales figures for the weekly sales reports. Ms. Soltis continued to generate the weekly reports, but Mr. Conlow provided her with the total sales figures. In addition, after the meeting Mr. Conlow became more critical of Ms. Soltis' work. Testimony of Soltis and Conlow.

26. Mr. Grossman informed Mr. Conlow in late May or early June 1993 that he had decided to transfer Ms. Soltis to Phoenix Management. Testimony of Conlow.

27. On June 21, 1993, Mr. Conlow notified Ms. Soltis that she was being transferred to the clerical pool at Phoenix Management effective July 1, 1993, at the same rate of pay. Mr. Conlow explained to Ms. Soltis that in her new position she would still do the clerical support work for Mr. Conlow and MT&C, but that she would no longer handle phone calls; attend MT&C meetings and training seminars; or handle administrative duties. Mr. Conlow described Ms. Soltis' new position as basically secretarial/word processing. In addition, Mr. Conlow informed Ms. Soltis that she would now report to Ann Hoeschen, an office manager who was disliked by Ms. Soltis and had on past occasions lost her temper and yelled at co-workers. Ms. Hoeschen had a reputation for being difficult and demanding with her staff. Ms. Soltis had told Mr. Conlow on previous occasions that she would never work for Ann Hoeschen. Ms. Soltis repeated to Mr. Conlow that she would not work for Ms. Hoeschen and told him that she would no longer be working for the company after July 1. Testimony of Soltis, Conlow, and Dale.

28. After Ms. Soltis' discussion with Mr. Conlow on June 21, she asked Mr. Conlow to write a letter of recommendation for her. Mr. Conlow told Ms. Soltis to draft a letter and said that he would sign it. Ms. Soltis did draft a letter of recommendation for Mr. Conlow to sign and left it on Mr. Conlow's desk. Mr. Conlow never signed the letter. Testimony of Soltis.

29. Prior to June 21, 1993, Ms. Soltis had received no indication from anyone at MT&C that she was to be transferred to Phoenix Management. Testimony of Soltis.

30. On June 23, 1993, Ms. Soltis accepted a clerical position at Pinkerton Company for the same rate of pay that she was receiving at MT&C.

31. On June 23, 1993, Ms. Soltis submitted a memo to Mr. Conlow resigning her position effective immediately. In the memo, Ms. Soltis stated that she was terminating her employment due to "an employment opportunity elsewhere." Exhibit 10.

32. After she left MT&C, Ms. Soltis suffered a loss of self-esteem and had trouble sleeping. Testimony of Soltis.

33. During the period of Ms. Soltis' employment, Respondent had no written policies or procedures for employees to follow if they believed that they had suffered discrimination or retaliation at work.

34. On June 21, 1994, Ms. Soltis filed a charge of discrimination against MT&C with the Department of Human Rights ("Department").

35. In a July 15, 1994, response to the Department of Human Rights, Steve Huston of MT&C explained that Ms. Soltis was reassigned to a clerical position at

Phoenix Management in order to provide her with an adequate workload and more consistent supervision. Mr. Huston stated that the reassignment of Ms. Soltis was a result of internal management discussions beginning in March of 1993. Mr. Huston further denied that MT&C had ever contemplated expanding the organizational structure of its office staff or promoting Ms. Soltis to office manager. Exhibit 5.

36. On November 9, 1995, the Department referred the charge to the Office of Administrative Hearings for hearing.

37. On November 28, 1995, Chief Administrative Law Judge Kevin Johnson served the parties with a Notice of and Order for Hearing.

38. A hearing on this matter was held on May 8, 9 and 17, 1996.

39. The Department of Human Rights incurred litigation and hearing expenses in the total amount of \$7,661.10 in connection with this matter.

40. The parties agreed at the hearing that service of the decision of the Administrative Law Judge by first class mail would be satisfactory, and waived the requirement set forth in Minn. Stat. § 363.071, subd. 2, for personal service on the Respondent and service by registered or certified mail on the Complainant.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge has the authority to consider the issues raised by Complainant's discrimination charges under Minn. Stat. §§ 363.071, subds. 1 and 2, and 14.50.

2. Proper notice of the hearing was timely given and all relevant substantive and procedural requirements of statutes and rules have been fulfilled.

3. The Respondent is an "employer" as defined in Minn. Stat. § 363.01, subd. 17. Complainant was an "employee" as defined in Minn. Stat. § 363.01, subd. 16.

4. Pursuant to Minn. Stat. § 363.03, subd. 7, it is an unfair discriminatory practice for an employer to intentionally engage in a reprisal against a person because that person opposed a practice forbidden under the Human Rights Act or filed a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under the Human Rights Act. The statute specifies that "[a] reprisal includes, but is not limited to, any form of intimidation, retaliation or harassment" and states that "[i]t is a reprisal for an employer to . . . transfer or assign the individual to a lesser position in terms of wages, hours, job classification, job security, or other employment status . . ." Id.

5. The Complainant has the burden of proof to establish by a preponderance of the evidence that Respondent committed an unfair discriminatory practice in violation of Minn. Stat. § 363.03, subd. 7. Greiner v. City of Champlin, 816 F. Supp. 528 (D. Minn. 1983).

6. Under the analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-804, 93 S.Ct. 1817, 1824-25 (1973), the Complainant has established a prima facie case of reprisal discrimination.

7. Respondent has articulated nondiscriminatory reasons for transferring Complainant to a clerical position in Phoenix Management.

8. Complainant has demonstrated that the nondiscriminatory reasons articulated by the Respondent were merely a pretext for discrimination.

9. Respondent's transfer of Complainant to a clerical position in Phoenix Management was an adverse employment action and constituted an unfair discriminatory practice within the meaning of Minn. Stat. § 363.03, subd. 7, which was undertaken in deliberate disregard of Complainant's rights under the Human Rights Act.

10. Retaliation was a substantial causative factor motivating Respondent in the decision to transfer Complainant. McGrath v. TCF Bank Savings, 502 N.W.2d 801, 806 (Minn. App. 1993), modified, 509 N.W.2d 365 (Minn. 1993).

11. Respondent's transfer of Complainant to a clerical position in Phoenix Management constituted intentional reprisal discrimination in violation of the Minnesota Human Rights Act, Minn. Stat. § 363.03, subd. 7.

12. Complainant's resignation on June 23, 1993, due to the retaliatory transfer constituted a constructive discharge stemming from intolerable working conditions.

13. Minn. Stat. § 363.071, subd. 2, permits an award of compensatory damages up to three times the amount of actual damages sustained by the victim of discrimination. Complainant did not suffer any actual damages as a result of the Respondent's reprisal because she began working in a new position at the same rate of pay immediately after terminating her employment with Respondent.

14. Under Minn. Stat. § 363.071, subd. 2, victims of discrimination are entitled to compensation for mental anguish and suffering due to discriminatory practices. In this case, Complainant endured mental anguish and suffering as a result of Respondent's discriminatory conduct and is entitled to compensation for mental anguish and suffering she has sustained in the amount of \$2,000.00.

15. Under Minn. Stat. § 363.071, subd. 2, and the standards set forth in Minn. Stat. § 549.20, punitive damages may be awarded for discriminatory acts where there is clear and convincing evidence that the acts of the employer show a deliberate disregard for the rights or safety of others. Complainant has made the required showing. In this case the Complainant is entitled to punitive damages in the amount of \$8,500.00.

16. Minn. Stat. § 363.071, subd. 2, requires the award of a civil penalty to the State when an employer violates the provisions of the Human Rights Act. Taking into account the seriousness and extent of the violation, the public harm occasioned by it, the financial resources of the Respondent, and whether the violation was intentional, the Respondent should pay a civil penalty to the State in the amount of \$8,500.00.

17. Minn. Stat. § 363.071, subd. 7, requires the award of litigation and hearing costs of the Department of Human Rights unless payment of the costs would impose a

financial hardship on Respondent. The Department shall be reimbursed in the total amount of \$7,661.10.

18. Minn. Stat. § 363.071, subd. 1(a), permits the Administrative Law Judge to require Respondent to reimburse Complainant for reasonable attorney's fees and costs. An award of reasonable attorney's fees and costs shall be made based upon an appropriate petition to be submitted by Complainant's attorney.

19. The reasons for the foregoing Conclusions of Law are set out in the Memorandum which follows and which is incorporated into these Conclusions of Law by reference.

Based on the foregoing Conclusions, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that:

1. Respondent shall pay Ms. Soltis \$2,000.00 as damages for mental anguish and suffering.
2. Respondent shall pay Ms. Soltis \$8,500.00 as and for punitive damages.
3. Respondent shall forthwith pay a civil penalty of \$8,500.00 to the State of Minnesota by mailing a check payable to the General Fund of the State of Minnesota to the Commissioner of Human Rights.
4. Respondent shall pay the Commissioner of Human Rights \$----- as and for litigation and hearing costs.
5. Within thirty (30) days of the date of this Order, the Complainant and/or her attorney shall file with the Administrative Law Judge and serve upon Respondent a petition for reimbursement for attorney's fees incurred in this matter. Failure to timely file such request for reimbursement will forfeit the payment of reasonable attorney's fees under Minn. Stat. § 373.01, subd. 2. Respondent shall file its response to the petition with the Administrative Law Judge and serve his response on Complainant within twenty (20) calendar days of its receipt of the petition. The Judge will take such additional argument and/or evidence as is deemed appropriate and shall issue a further Order setting the final amount of fees to be paid by Respondent.
5. Respondent shall cease and desist from any further acts of reprisal in violation of the Human Rights Act and shall prepare and distribute an appropriate written equal employment opportunity policy which includes a discussion of the prohibition in the Minnesota Human Rights Act against acts of reprisal. Respondent shall also post the Findings of Fact, Conclusions and Order in this matter on employee bulletin boards in all companies owned and operated by Thomas Grossman from November 1, 1996, to December 2, 1996.
6. All payments to be made hereunder shall be made within 30 days of the date of this Order.

Dated this 16th day of October, 1996.

BARBARA L. NEILSON
Administrative Law Judge

Reported: Taped (10 Tapes).

NOTICE

Pursuant to Minn. Stat. §14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

Complainant Ann Soltis brought this action against her former employer, MT&C, alleging reprisal discrimination in violation of the Minnesota Human Rights Act. Specifically, Complainant alleges that she was transferred to a lesser position shortly after she complained to her supervisor and to the CEO that MT&C had discriminated against her co-worker, Lynne Dale, on the basis of sex. Complainant maintains that the transfer was in effect a demotion and that Respondent's decision to transfer her was motivated by retaliation. Respondent maintains that Ms. Soltis' transfer was lateral and was part of a larger reorganization strategy that was planned well in advance of her complaints.

The Minnesota Human Rights Act prohibits employers from intentionally engaging in acts of reprisal against any person because that person opposed a practice forbidden under the Act or filed a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under the Act. Minn. Stat. § 363.03, subd. 7. In order to establish a prima facie case of reprisal discrimination pursuant to the Minnesota Human Rights Act, the Complainant must show that: (1) she engaged in statutorily protected activity; (2) Respondent took adverse employment action against her; and (3) a causal connection exists between the adverse employment action and the protected activity. Wentz v. Maryland Casualty Co., 869 F.2d 1153, 1154 (8th Cir. 1989). If the Complainant establishes a prima facie case, a presumption is created that the employer unlawfully discriminated against her and the burden shifts to the Respondent to articulate some legitimate, nondiscriminatory reason for its actions. Sigurdson v. Isanti County, 386 N.W.2d 715, 720 (Minn. 1986). If the Respondent meets this burden, the Complainant must show by a preponderance of the evidence that the Respondent's reasons for its actions were merely a pretext for discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973). The ultimate burden of persuading the trier of fact that the Respondent engaged in intentional discrimination remains at all times with the Complainant. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742 (1993); Greiner v. City of Champlin, 816 F. Supp. 528 (D. Minn. 1983).

Ms. Soltis did engage in statutorily protected conduct when she complained of disparate treatment on behalf of Lynne Dale. MT&C concedes that Ms. Soltis presented

claims of possible sex discrimination at the May 21, 1993 sales meeting and in her later meeting with Tom Grossman and Steve Huston. Federal case law has established that Title VII protection extends to those who suffer retaliation for assisting others in enforcing their Title VII rights. For example, in Roos v. Smith, 837 F. Supp. 803 (S.D. Miss. 1993), the court found that a university's decision not to renew a professor's contract was made in retaliation for the professor testifying on behalf of another professor who had brought a race discrimination claim against the university. Also, in Davis v. Fleming, 55 F.3d 1369 (8th Cir. 1995), the plaintiff alleged that he was transferred and later discharged in retaliation for reporting to the Human Resources Department an incident of possible sexual harassment involving a male manager and female employee. The Eighth Circuit Court of Appeals determined that Davis had established a prima facie case of reprisal discrimination and that a reasonable jury could find that Davis was fired because of his protected activity in reporting the harassment. Id. at 1374. Thus, summary judgment in favor of the employer was reversed. Like Roos and Davis, Ms. Soltis' complaint of sex discrimination on behalf of Lynne Dale was statutorily protected conduct. In addition, it is not required that Ms. Soltis' accusations be true. Ms. Soltis is only required to show that she had a reasonable or good faith belief that discrimination was occurring in order for her complaints to be protected conduct. Trent v. Valley Electric Assoc., 41 F.3d 524, 526 (9th Cir. 1994); Olchefski v. Star Tribune, WL 70190 (Minn. App. 1995). She has made that showing in the present case through her own testimony and that of Ms. Dale.

Ms. Soltis next argues that Tom Grossman's decision to transfer her to a clerical position at Phoenix Management was an adverse employment action. Ms. Soltis maintains that the new position was not a lateral transfer but a demotion. Instead of performing administrative and office manager duties, Ms. Soltis argues that, after the transfer, she would have been placed in what was essentially a clerical typing pool. Specifically, she would no longer attend sales meetings or showcases, she would no longer be able to use her business cards with the title "Administrator," and she would no longer assist in the preparation of sales proposals. Respondent emphasizes that Ms. Soltis' wage and benefits would have remained the same and insists that Ms. Soltis was not demoted but merely transferred from one supervisor to another.

Both federal and state courts have found that, for purposes of reprisal discrimination, a lateral transfer may constitute an adverse employment action even where the transfer does not result in a loss of pay or benefits. In other words, adverse action is not limited to strictly monetary considerations. For example, in Collins v. State of Illinois, 830 F.2d 692 (7th Cir. 1987), the court found that a plaintiff (a librarian) had established adverse employment action where she was transferred to a new department; relegated to doing reference work instead of consulting; and no longer had her own office, printed business cards, or a "consultant" listing in publications. Likewise, in Jacobs v. Martin Sweets Co., 550 F.2d 364, 369 (6th Cir. 1977), the court held that, even though a job transfer involved no change in hours or salary, a transfer from the position of executive secretary for a senior vice president to "just a clerical position" in the purchasing department was an adverse employment action. More recently, in Dahm v. Flynn, 60 F.3d 253, 257 (7th Cir. 1994), the court held that a reduction in the quality or skill level of job responsibilities could rise to the level of adverse employment

action, even if the time required to perform the duties remains constant. In Dahm, a former employee of the Wisconsin state lottery brought a § 1983 action against the lottery director alleging retaliation for her criticisms of the director at a legislative audit hearing. Dahm alleged that after she testified, the director reduced and reassigned many of her more challenging duties and increased her more routine or “paper processing” tasks. The court determined that there was a question of fact as to whether the reduction in the skill level of plaintiff’s duties was more than a trivial change. Id.

However, courts have made clear that a material adverse change in the terms and conditions of employment “must be more disruptive than a mere inconvenience or an alteration of job responsibilities.” Crady v. Liberty National Bank & Trust Co., 993 F.2d 132, 136 (7th Cir. 1993). In Williams v. Bristol-Myers Squibb Co., 85 F.3d 270, 274 (7th Cir. 1996), the court found that purely lateral transfers that involve no reduction in pay and no more than minor changes in working conditions cannot rise to the level of materially adverse employment action. In this case, the court found that the redrawing of a salesman’s territory did not rise to the level of an adverse employment action where the salesman’s job functions and salary stayed the same and the only change was his initial lower commissions. Id. at 274.

In the instant case, Ms. Soltis has made a sufficient showing that she was subjected to adverse employment action after she complained about the unequal treatment of Lynne Dale. Mr. Conlow admitted in his testimony that Ms. Soltis’ new position at Phoenix was “more of a secretary position - word processing.” While Ms. Soltis did perform a number of clerical functions for MT&C, she also carried out administrative duties. In particular, the testimony from Ms. Soltis, Ms. Dale, Mr. Erickson and Mr. Conlow established that Ms. Soltis assisted in drafting sales proposals; attended sales meetings; managed the office; organized at least one “showcase,” answered inquiries about MT&C at seminars and on the phone; was issued, with Mr. Conlow’s approval, business cards with the title “Administrator,” and was introduced at seminars as Mr. Conlow’s “assistant.” Testimony further established that Ms. Soltis’ new position at Phoenix Management would be strictly clerical. In addition, Ms. Soltis would report to an office manager instead of a vice president and general manager. In fact, Respondent seems to concede in its July 15, 1994 response to the Department of Human Rights that Ms. Soltis was being transferred from an administrative position to a clerical position. The letter states that Ms. Soltis was reassigned from an “administrative support position” to a “clerical position” in order to provide her with an adequate work load. (Exhibit 5).

Finally, Complainant maintains that there is a causal link between her complaints of discrimination on behalf of Lynne Dale and her transfer to a clerical position at Phoenix Management. In Dietrich v. Canadian Pacific Ltd., 536 N.W.2d 316, 327 (Minn. 1995), the Minnesota Supreme Court explained that the causal connection requirement may be satisfied “by evidence of circumstances that justify an inference of retaliatory motive, such as a showing that the employer has actual or imputed knowledge of the protected activity and the adverse employment action follows closely in time.” Citing Hubbard v. UPI, Inc., 330 N.W.2d 428, 444 (Minn. 1983). Likewise, in Evans v. Ford Motor Co., 768 F.Supp. 1318, 1326 (D. Minn. 1991), the court held that “the causal link

between the protected activity and the adverse employment action may be shown by such temporal proximity between the two as to justify an inference of retaliatory motive.”

Based on the proximity in time between Ms. Soltis’ sex discrimination complaints and the date that she was told that she would be transferred to Phoenix Management (one month), the Administrative Law Judge finds that Complainant has demonstrated a causal connection between the adverse employment action and the protected activity. Therefore, Complainant has established a prima facie case of reprisal discrimination. Accordingly, a presumption is created that MT&C unlawfully discriminated against her and the burden shifts to Respondent to produce evidence of some legitimate, nondiscriminatory reasons for its actions.

Respondent has articulated legitimate, nondiscriminatory reasons for transferring Ms. Soltis to Phoenix Management. Respondent maintains that the decision to transfer Ms. Soltis was part of a larger reorganization plan to move all the clerical and financial functions of the dealerships, financial services company, and MT&C to a separate management company. According to Respondent, the reorganization plan was finalized in March of 1993. Specifically, Mr. Grossman stated that he made the decision to transfer Ms. Soltis to Phoenix by March of 1993 because he believed that Ms. Soltis had an inadequate workload at MT&C and that her time could be better put to use at Phoenix Management. MT&C argues that this case is controlled by Dietrich v. Canadian Pacific Ltd., 536 N.W.2d 319 (Minn. 1995). In Dietrich, an employee brought a claim under the Minnesota Human Rights Act alleging age discrimination and reprisal regarding the elimination of her job and other training and hiring opportunities. The employer maintained that plaintiff’s position was eliminated as part of a company-wide reduction-in-force. The Court determined that the employer’s reorganization plan resulting in the abolition of plaintiff’s job was well substantiated and resulted in a bona fide reduction-in-force. Id. at 327. The trial court’s grant of summary judgment for the employer was affirmed. Like Dietrich, MT&C maintains that its reorganization plan was in place well before Ms. Soltis made her sex discrimination complaints.

Once Respondent has put forth nondiscriminatory reasons for its employment action, Complainant has the burden of showing, by a preponderance of the evidence, that Respondent’s proffered legitimate reasons are merely a pretext for reprisal discrimination. Sigurdson, 386 N.W.2d at 720. In order to establish reprisal discrimination under the Minnesota Human Rights Act, Complainant need only prove that retaliation was a substantial causative factor motivating Respondent’s adverse action. McGrath v. TCF Bank, 502 N.W.2d 801, 806 (Minn. App. 1993), modified, 509 N.W.2d 365 (Minn. 1993); Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619 (Minn. 1988). That is, it is not necessary that Complainant establish that the reprisal discrimination was the sole reason for the adverse action. Weihoff v. GTE Directories Corp., 61 F.3d 588, 598 (8th Cir. 1995).

Complainant has demonstrated in this case that Respondent’s proffered legitimate reasons for transferring her are a pretext for reprisal discrimination. Several factors form the basis for this determination. Ms. Soltis was informed of the decision to transfer her only approximately one month after she complained of discrimination, and the person who made the decision to transfer her (Mr. Grossman) is the same person who called her into his office immediately following the May 21 MT&C meeting, yelled at

her, and reacted angrily to her complaints. The Judge credits Ms. Soltis' testimony that Mr. Grossman yelled at her following the MT&C meeting on May 21 and does not find Mr. Grossman's denial of such conduct believable, particularly in light of testimony from Ms. Dale and Mr. Erickson* confirming that Mr. Grossman occasionally lost his temper and yelled at subordinates.

Unlike Dietrich, 536 N.W.2d 319 (Minn. 1995), which MT&C urges the Judge to follow, the reorganization plan at issue in this case is not "well substantiated." In putting forth its nondiscriminatory reason for transferring Ms. Soltis, Respondent offered no documentation to support its claim that its reorganization plan was completed as of March of 1993. The Respondent relied solely on the testimony of Mr. Grossman that the reorganization plan was finalized in March of 1993 and that staged transfers of the various functions took place within the first eight months of 1993. The Administrative Law Judge does not find Mr. Grossman's testimony that he decided to transfer Ms. Soltis prior to the May 21 meeting to be persuasive. It is evident that all of the other transfers of personnel to Phoenix Management occurred well before Ms. Soltis' transfer. Mr. Grossman testified that the delay in transferring Ms. Soltis to Phoenix Management was explained in part by the need to "build out space" and to transfer employees in "stages." This explanation is not convincing in light of the fact that several other clerical workers had been transferred to Phoenix Management previously, Ms. Soltis was the sole remaining person to be transferred and the only individual to be transferred from MT&C, and Ms. Soltis was merely being transferred to a "typing pool" that hardly would have required the building of a private office for her. Moreover, it defies belief that Mr. Conlow would not have been informed of a decision to transfer Ms. Soltis purportedly made in March until "late May or early June." Mr. Conlow's discussions with Mr. Grossman during early 1993 apparently focused merely on the fact that Mr. Grossman saw no need to hire further clerical help within MT&C for Ms. Soltis to supervise due to the planned reorganization and did not focus on any decision to transfer Ms. Soltis' position. Moreover, given the administrative/clerical mix of Ms. Soltis' position, it would not necessarily be a foregone conclusion that she would be transferred with other "clericals" in the companies owned and operated by Mr. Grossman. In addition, Mr. Grossman's testimony that Ms. Soltis was transferred in part because she had an inadequate workload at MT&C was contrary to consistent testimony by Lynne Dale, Lennie Erickson, and Rick Conlow that Ms. Soltis was a hard worker who was very busy and had plenty of work to do.

A finding of pretext is also supported by the position taken by MT&C in its July 15, 1994, submission to the Department of Human Rights in response to Ms. Soltis' discrimination charge. (Exhibit 5.) In that response, the Company denied that a proposal to promote Ms. Soltis to an office manager position was ever contemplated and denied the existence of Mr. Conlow's proposed 1993 organizational plan which showed Ms. Soltis as "office manager" supervising two clerical staff. MT&C stated in its letter to the Department that it never prepared or considered a proposal for such an organizational structure. However, when presented at the hearing with a copy of the proposed organizational chart drafted by Mr. Conlow in late 1992 or early 1993 (Exhibit 2), Mr. Grossman admitted that the chart "looked familiar" and acknowledged that Mr. Conlow had presented several charts over the years as part of his annual forecasts. Mr. Grossman also testified that Conlow "regularly" came to him with proposals for

additional staff. Exhibit 2; Testimony of Grossman. This earlier denial by MT&C of the existence of the organizational chart calls in to question the credibility of Mr. Grossman's testimony on his reorganization plans for MT&C.

Furthermore, Respondent does not mention in the July 15, 1994, letter any argument that Ms. Soltis was transferred as part of a broad reorganization plan to move all clerical functions to Phoenix Management. Rather, Respondent only mentions internal discussions of reassigning Ms. Soltis. Respondent's reply letter states: "From March 1993 forward, internal management discussions occurred of rearrangement of work duties and reassignment of Ms. Soltis in order to provide an adequate workload leading up to her reassignment on June 21, 1993 to a clerical position" Because the earlier response letter did not mention the allegation asserted by the Company at the hearing that Ms. Soltis was transferred as part of an overall reorganization of clerical functions throughout the companies operated by Mr. Grossman, it further supports a finding of pretext. See, e.g., Perfetti v. First National Bank of Chicago, 950 F.2d 449, 456 (7th Cir. 1991), cert. denied, 505 U.S. 1205 (1992) ("[i]f at the time of the adverse employment decision the decision-maker gave one reason, but at the time of the trial gave a different reason which was unsupported by the documentary evidence the jury could reasonable conclude that the new reason was a pretextual after-the-fact justification").

After a thorough review of all the evidence, the Administrative Law Judge finds that Complainant has shown, by a preponderance of the evidence, that Respondent's proffered legitimate reasons for transferring and demoting her are merely a pretext for reprisal discrimination and that she was constructively discharged as a result of the reprisal. Retaliation for Ms. Soltis' sex discrimination complaints was a substantial causative factor motivating Respondent's adverse action. Therefore, the Judge finds that Respondent engaged in reprisal discrimination in violation of the Minnesota Human Rights Act, Minn. Stat. § 363.03, subd. 7.

Minn. Stat. § 363.071, subd. 2, allows the Administrative Law Judge to award compensatory damages up to three times the amount of actual damages sustained by the victim of discrimination. Because Ms. Soltis began working in a new position at the same rate of pay immediately after terminating her employment with Respondent, she did not suffer any actual damages as a result of the Respondent's reprisal. Accordingly, no award of compensatory damages has been made.

Pursuant to Minn. Stat. § 363.071, subd. 2, victims of discrimination are also entitled to compensation for mental anguish and suffering due to discriminatory practices. Ms. Soltis presented adequate evidence that she did suffer mental anguish as a result of Respondent's retaliatory conduct as evidenced by a loss of self-esteem and difficulty sleeping. An award of damages for mental anguish in discrimination cases may be based on subjective testimony. To be recoverable, pain and suffering does not have to be severe or accompanied by physical injury. Gilson v. State Department of Natural Resources, 492 N.W.2d 835, 842 (Minn. App. 1992). Based upon the subjective descriptions of the mental anguish and suffering Ms. Soltis has endured over the course of this litigation, the Judge believes that a damage award for mental anguish and suffering of \$2,000.00 is appropriate.

Under Minn. Stat. § 363.071, subd. 2, and the standards set forth in Minn. Stat. § 549.20, punitive damages may be awarded for discriminatory acts where there is clear and convincing evidence that the acts of the employer show a deliberate disregard for the rights or safety of others. The award of punitive damages is based on the following considerations: seriousness of the harm to the public arising from Respondent's misconduct; Respondent's awareness of the fact that reprisal was illegal; and the financial condition of the Respondent. Respondent did not dispute Complainant's testimony that MT&C is a branch of a \$16.7 million company. Consideration was also given to the effect of other penalties awarded the Complainant and the fact that no compensatory damages were awarded to Complainant. Respondent's retaliatory transfer and demotion of Complainant in response to her allegation of sex discrimination is directly contrary to the provisions of the Minnesota Human Rights Act and may have an obvious chilling effect on the exercise of statutorily-protected rights by other employees. The Judge has determined in this case that the Complainant is entitled to punitive damages in the amount of \$8,500.00.

Minn. Stat. § 363.071, subd. 2, requires the Administrative Law Judge to assess a civil penalty against an employer who violates the provisions of the Minnesota Human Rights Act. This penalty is paid to the State. The statute requires the Judge to take into account in determining the amount of the civil penalty to be paid "the seriousness and extent of the violation, the public harm occasioned by the violation, whether the violation was intentional, and the financial resources of the Respondent." This case involves an important matter of public policy: whether a citizen can raise discrimination concerns in good faith without risking adverse employment action and constructive discharge. The legislature has determined that retaliation in response to an employee's opposition to discrimination is prohibited. Respondent intentionally engaged in such retaliation in deliberate disregard of Ms. Soltis' rights. Based upon careful consideration of all of these factors, the Judge has determined that a civil penalty in the amount of \$8,500.00 appropriate.

Minn. Stat. § 363.071, subd. 7, requires the award of litigation and hearing costs of the Department of Human Rights unless payment of the costs would impose a financial hardship on Respondent. The Department has incurred costs for the hearing process at the Office of Administrative Hearings in the total amount of \$7,661.10 and shall be reimbursed in that amount.

Minn. Stat. § 363.071, subd. 1(a), permits the Administrative Law Judge to require Respondent to reimburse Complainant for reasonable attorney's fees and costs. The Judge has determined that an award of reasonable attorney's fees and costs shall be made in this case if an appropriate petition is submitted by Complainant's attorney within thirty (30) days of the date of this Order. Respondent shall file its response to the petition within twenty (20) calendar days of its receipt of the petition. The Judge will take such additional argument and/or evidence as is deemed appropriate and shall issue a further Order setting the final amount of fees to be paid by Respondent.

Finally, Minn. Stat. § 363.071, subd. 2, authorizes the Administrative Law Judge to order affirmative relief to effectuate the purposes of the Minnesota Human Rights Act. In this case the Judge has required that Respondent cease and desist from any

further acts of reprisal in violation of the Human Rights Act and prepare and distribute within 60 days an appropriate written equal employment opportunity policy which includes a discussion of the prohibition in the Minnesota Human Rights Act against acts of reprisal. Respondent has also been required to post the Findings of Fact, Conclusions and Order in this matter on employee bulletin boards in all companies owned and operated by Thomas Grossman for a period of one month in order to ensure that employees are aware of the disposition of this matter.

B.L.N.

* The Administrative Law Judge is aware that Mr. Erickson and Ms. Dale are also involved in litigation with MT&C, but found their testimony in this matter to be credible and unaffected by their own disputes with the Company.