

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

State of Minnesota, by
Dolores Fridge, Commissioner,
Department of Human Rights,

Complainant,

**ORDER ON MOTION
FOR SUMMARY DISPOSITION**

v.

Green Tree Financial Corporation,
Respondent.

The above-entitled matter is before the undersigned Administrative Law Judge on Respondent's motion for summary disposition. Oral argument on Respondent's motion was heard August 26, 1997. The record closed on August 27, 1997, upon receipt of the transcript of the deposition of William Gieschen.

Ann Huntrods, Esq., Briggs and Morgan, P.A., 2200 First National Bank Building, St. Paul, Minnesota, 55101, appeared on behalf of Green Tree Financial Corporation ("Respondent").

Erica Jacobson, Assistant Attorney General, 445 Minnesota Street, St. Paul, Minnesota, 55101, appeared on behalf of the Department of Human Rights ("Department").

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED:

1. That Respondent's motion for partial summary disposition on the issue of Hunter's disability status under the MHRA is DENIED.
2. That Complainant's cross motion for partial summary disposition on the issue of Hunter's disability status is GRANTED.
3. That Respondent's motion for summary disposition on Complainant's claim of failure to reasonably accommodate Hunter's disability is DENIED.

Dated this ___ day of September, 1997.

BRUCE H. JOHNSON
Administrative Law Judge

MEMORANDUM

This case involves a disability discrimination claim brought pursuant to the Minnesota Human Rights Act (hereinafter sometimes "MHRA") against Green Tree Financial Corporation (hereinafter "Green Tree" or "Respondent"). It is before the Administrative Law Judge on the Respondent's motion for summary disposition.^[1]

Charles Hunter, a former employee of Green Tree, is an insulin-dependent diabetic. Hunter worked for Green Tree as a credit manager for approximately 15 days before resigning his position. The Department maintains that Hunter is an individual with a disability and that Green Tree failed to reasonably accommodate Hunter's disability while he was employed. Consequently, the Department contends that Hunter's resignation was effectively a constructive discharge. Hunter suffers from retinopathy and neuropathy as a result of his diabetes. (Mulmed Depo. pp. 8-9, 15-18.) Retinopathy is a condition which limits Hunter's ability to see, and neuropathy limits his physical ability. (Mulmed Depo. pp. 9-15; 53-58.) According to the facts as presented by Complainant,^[2] Hunter learned of an employment opportunity at Green Tree in early March of 1995 from William [Rich] Gieschen. (Hunter Depo. at 70.) Gieschen is the assistive technology and job placement specialist for the State Services for the Blind ("SSB"). Gieschen arranged for Hunter to be interviewed at Green Tree for the position of credit manager in Green Tree's consumer finance division. (*Id.*) Hunter interviewed with Kristen Solberg, Corporate Human Resources Manager, and with Joseph Kelsey, Senior Credit Manager. (*Id.* at 71 and 75.) During the interview with Kelsey, Hunter was told that the work schedule for credit managers generally rotated among the following shifts: "seven to four, eight to five, nine to six, ten to seven, and one out of three Saturdays." (*Id.* at 76-78.)

A few days after the interviews, Solberg offered Hunter the position of credit manager. (Hunter Depo. at 82.) At the time of the offer, Hunter told Solberg that he would be interested in accepting the position and that there were certain accommodations that he might need. (*Id.* at 83.) Specifically, Hunter told Solberg that he had a vision impairment and that he had questions about the scheduling. (*Id.* at 83.) Prior to the time Hunter started working at Green Tree, he attended a meeting with Solberg and Gieschen to determine what accommodations were needed for his visual impairment. (*Id.* at 86-90.) Pursuant to Gieschen's assessment, a closed circuit television magnifier and a 21-inch computer monitor were installed in Hunter's work station. (*Id.* at 95.) At the conclusion of this meeting, Hunter told Solberg that he was a diabetic and that he had concerns about the rotating shifts. (*Id.* at 90). Solberg told Hunter that she did not anticipate a problem and that he should speak directly to Kelsey about his concerns. (*Id.* at 91).

On March 20, 1995, Hunter began his employment at Green Tree. On his first day, he spoke with his supervisor, Kelsey, about his need for a consistent schedule due to his diabetes. (Hunter Depo. at 118-19.) Kelsey directed Hunter to talk to Judy Glewwe who was in charge of setting up employees' work schedules. (*Id.* at 118.) Hunter told Glewwe that he needed a more consistent schedule because he was a diabetic. (*Id.* at 121.) Glewwe assigned Hunter a 9:00 a.m. to 6:00 p.m. work day

schedule for most days and a 12:00 p.m. to 9:00 p.m. shift for Thursdays. (Id. at 125.) Glewwe told Hunter that she might also be able to work on a consistent Friday scheduling at a later time. (Id.)

During the fifteen days Hunter worked for Green Tree his schedule was 9:00 a.m. to 6:00 p.m. On two occasions, Hunter worked one hour past 6:00 p.m. On one occasion, Hunter's lunch break was delayed for approximately 45 minutes. Due to the delay, Hunter began to feel disoriented, shaky and sweaty. (Hunter Depo at 128.) Hunter told Kelsey that he was having low blood sugar or a diabetic reaction and that he needed to go to lunch and get some food. (Id.) Kelsey denied Hunter's request that he be allowed to go to lunch and instructed Hunter to return to work. (Id.) Hunter ate candy at his desk in order to raise his low blood sugar level and to avoid a full-blown reaction. (Id.) As a result of the delayed lunch incident, Hunter had a rough afternoon and evening. (Id.) Shortly after that incident, Hunter told Kelsey that he needed a "more consistent schedule". (Id. at 129.) After discussing the matter with Glewwe, Kelsey told Hunter to "just keep trying the schedule". (Id. at 131.)

On approximately April 4, 1995, Hunter handed Kelsey a letter and told Kelsey that he would like to discuss his scheduling problem. (Hunter Depo at 133; Ex. 7.) Gieschen from the SSB had assisted Hunter in drafting the letter. (Id. at 132-33.) In the letter, Hunter requested that Kelsey consider allowing him a work schedule of Monday through Friday 9:00 a.m. to 5:30 p.m., with one Saturday/Sunday combination per month. (Ex. 7.) Hunter ended the letter with the statement: "I look forward to discussing the issues with you at your convenience." (Id.) Kelsey told Hunter that he did not think the requested schedule was possible. (Hunter Depo at 134.) Kelsey also said that it would not be fair to the other credit managers to give Hunter such a schedule. (Id.) Hunter told Kelsey that he would be willing to provide human resources with medical verification that he needed the hours requested. (Id. at 136.) Kelsey responded by reiterating that it would not be possible to accommodate Hunter's schedule request. (Id.) Hunter told Kelsey that if his schedule did not change he would be forced to look for another job or quit. (Id. at 136-37.) Kelsey replied that it might be a good idea for Hunter to look at other employment possibilities. (Id. at 137.) Hunter resigned his employment on April 7, 1995. (Id. at 150.)

Respondent has brought a motion for summary disposition. Respondent first maintains that Hunter is not disabled within the meaning of the Minnesota Human Rights Act. Specifically, Respondent contends that Hunter is only materially limited with respect to his vision. Respondent argues that, given Green Tree's reasonable accommodation of Hunter's visual impairment, Hunter is not otherwise disabled or entitled to protection under the Act. Alternatively, if the Administrative Law Judge were to find that Hunter is disabled, Respondent contends that there is no evidence to support Complainant's claim that Green Tree knew of Hunter's other limitations or that it failed to provide reasonable accommodations. Both parties agree that there are no factual disputes regarding whether Hunter has a disability and that this issue may be determined as a matter of law. However, with respect to whether Green Tree failed to reasonably accommodate Hunter, Complainant maintains that there are several disputed issues of material fact which make summary disposition in favor of Respondent inappropriate.

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law. Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955); Minn. Rule pt. 1400.5500K; Minn.R.Civ.P. 56.03. The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested case matters. See, Minn. Rules, pt. 1400.6600. A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case. Illinois Farmers Insurance Co. v. Tapemark Co., 273 N.W.2d 630, 634 (Minn. 1978); Highland Chateau v. Minnesota Department of Public Welfare, 356 N.W.2d 804, 808 (Minn. App. 1984).

The moving party, in this case the Respondent, has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary judgment, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case. Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988); Hunt v. IBM Mid America Employees Federal, 384 N.W.2d 853, 855 (Minn. 1986). The existence of a genuine issue of material fact must be established by the nonmoving party by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05. Id.; Murphy v. Country House, Inc., 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (Minn. 1976); Carlisle v. City of Minneapolis, 437 N.W.2d 712, 75 (Minn. App. 1988). The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial. Carlisle, 437 N.W.2d at 715 (citing, Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)).

When considering a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party. Ostendorf v. Kenyon, 347 N.W.2d 834 (Minn. App. 1984). All doubts and factual inferences must be resolved against the moving party. See, e.g., Celotex, 477 U.S. at 325; Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988); Greaton v. Enich, 185 N.W.2d 876, 878 (Minn. 1971); Thompson v. Campbell, 845 F. Supp. 665, 672 (D. Minn. 1994). If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986).

This matter is governed by the Minnesota Human Rights Act (MHRA) which provides that it is an unfair employment practice for an employer to discriminate against an employee or applicant because of a disability. Minn. Stat. § 363.03, subd. 1(2)(c) (1996). The Act defines disability as:

Any condition or characteristic that renders a person a disabled person. A disabled person is any person who (1) has a physical, sensory, or mental impairment which materially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment.

Minn. Stat. § 363.01, subd. 13 (1996).

The MHRA provides that it is an unfair employment practice for an employer not to make reasonable accommodation to the known disability of a qualified disabled person unless the employer can demonstrate that the accommodation would impose an “undue hardship” on the business or agency. Id., subd. 1(6) (1997 Supp.). “Reasonable accommodation” may include but is not limited to:

- (a) making facilities readily accessible to and usable by disabled persons; and
- (b) job restructuring, modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, and the provision of aides on a temporary or periodic basis.

Minn. Stat. § 363.03, subd. 1(6).

In construing the Minnesota Human Rights Act the Minnesota appellate courts often look to similar federal legislation and case law such as Title VII of the federal Civil Rights Act, the Americans with Disabilities Act (ADA) and the federal Rehabilitation Act. Johnson v. Piper Jaffray, Inc., 530 N.W.2d 790, 801 (Minn. 1995); Fahey v. Avnet, Inc., 525 N.W.2d 568, 572 (Minn. App. 1995). Although federal precedent is not controlling, it is instructive. Likewise, EEOC Guidelines are not binding on courts but they are a source of informed and persuasive interpretation by the enforcing administrative agency to which courts and litigants may properly resort for guidance. See, Gen. Electric Co., v. Gilbert, 429 U.S. 125, 141-42 (1976).

As an initial matter, Complainant argues that the McDonnell-Douglas burden shifting analysis is not applicable to reasonable accommodation claims brought under the Minnesota Human Rights Act. Rather, the McDonnell-Douglas burden-shifting method of proof should only be used with respect to claims under the Human Rights Act when there is no direct evidence of discrimination and disparate impact analysis is required. Fahey v. Avnet, Inc., 525 N.W.2d 568 (Minn. App. 1994). Complainant maintains that because it is not arguing that Green Tree treated Hunter less favorably than other similarly situated non-disabled employees, there is no need for indirect proof or burden shifting. Instead, Complainant’s argument is that Green Tree failed to provide a reasonable accommodation for Hunter’s disability which, if proven, directly establishes a violation of the MHRA. Minn. Stat. § 363.03, subd. 1(6). See, Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281 (7th Cir. 1996). Consequently, because this is not a disparate treatment case, the McDonnell-Douglas burden shifting framework is not necessary.

The Administrative Law Judge finds Complainant’s argument and the reasoning based on Bultemeyer to be persuasive and concludes that the burden shifting analysis of McDonnell-Douglas is inapplicable to reasonable accommodation claims brought under the Minnesota Human Rights Act, at least when there is no companion claim of disparate treatment. Instead, in order to make a prima facie showing of disability discrimination under the MHRA based on a claim of failure to provide a reasonable accommodation, Complainant must show that Hunter has a disability within the meaning of the Act, that he notified Green Tree of his disability and his need for an accommodation, and that Green Tree failed to provide him with a reasonable accommodation. If Complainant makes such a showing, the employer may come

forward with evidence to demonstrate that the proposed accommodation is unreasonable and would cause it to suffer undue hardship. Minn. Stat. § 363.03, subd. 1(6) (1996).

Complainant claims that Hunter's diabetes is a disability that materially limits one or more of his life activities. Whether an impairment materially limits a major life activity is determined on a case-by-case basis. State by Cooper v. Hennepin County, 441 N.W.2d 106, 110 (Minn. 1989), citing, 45 C.F.R. § 84.3(j)(2)(ii). In Sigurdson v. Carl Bolander & Sons, 532 N.W.2d 225, 229 (Minn. 1995), the Minnesota supreme court held that an insulin-dependent diabetic was not disabled for purposes of the Minnesota Human Rights Act where he was not materially limited in his ability to work. The plaintiff had claimed that his diabetes materially limited his ability to work because it affected his ability to eat which in turn affected his health. While the court acknowledged that diabetes is an impairment, the court held that diabetes is not a disability per se. Id. Rather, the court explained that the issue to be determined is whether an individual's diabetes caused a material impairment as required by Minn. Stat. §363.03, subd. 13(1). Because plaintiff's diabetes had not materially limited his ability to obtain and retain employment, the court concluded that plaintiff's failure to obtain one job did not render him disabled. Id.

Respondent urges the Administrative Law Judge to follow Sigurdson and find that Hunter's insulin-dependent diabetes does not render him disabled under the Minnesota Human Rights Act. Respondent points to Hunter's uninterrupted employment history of more than 20 years as evidence that, like Sigurdson, Hunter is not materially limited in working. Moreover, Respondent argues that Hunter's own physician testified that there is no medical reason why Hunter could not hold a full-time or 40-hour a week job in any office setting. (Mulmed Depo at 21.) While Respondent does not dispute that Hunter is materially limited in his ability to see (Resp. Memo at 10), it argues that Hunter's visual impairment should be analyzed separately from his diabetes. According to Respondent, apart from Hunter's known visual impairment, Hunter's diabetes did not result in any other material limitations. Given that Green Tree fully accommodated Hunter's visual impairment, Respondent contends that Hunter's diabetes should not render him disabled per se and obligate Green Tree to provide further accommodations unrelated to his visual limitations.

Respondent's reliance on Sigurdson and emphasis on Hunter's employment history is misplaced. Unlike the plaintiff in Sigurdson, Hunter is claiming that he is disabled because his diabetes has materially limited his ability to see. Consequently, Hunter's ability to obtain and retain employment is not determinative of whether Hunter has a disability – at least when “working” is not the major life activity relied on to establish disability status under Minn. Stat. § 363.01, subd. 13 (1996). See, Doane v. City of Omaha, 115 F.3d 624, 628 (8th Cir. 1997) (principle that a plaintiff's major life activity of working is not substantially limited by inability to perform single job inopposite where major life activity affected is seeing, not working.)

Based on the evidence presented, the Administrative Law Judge finds that Hunter is a person with a disability within the meaning of the Minnesota Human Rights Act. Complainant has established that Hunter has diabetes and that his diabetes has

materially limited at least one major life activity. Specifically, Hunter's diabetes has caused retinopathy which materially limits Hunter's ability to see. The ability to see is a major life activity. State by Beaulieu v. Clausen, 491 N.W.2d 662 (Minn. App. 1992). Therefore, pursuant to Minn. Stat. § 363.01, subd. 13 (1996), Hunter is a person with a disability entitled to the protections afforded by the Minnesota Human Rights Act. The fact that Green Tree provided accommodations for Hunter's visual impairment is immaterial to the initial determination of whether Hunter has a disability.

Moreover, the accommodations provided do not change Hunter's status from a disabled person to a non-disabled person, or remove Hunter from the protective provisions of the MHRA. The fact remains that even with the use of insulin and assistive devices to ameliorate the effects of his impairment, Hunter nonetheless has a material limitation on a major life activity which renders him disabled. See, 29 C.F.R. pt. 1630, app. § 1630.2(j); Doane, 115 F.3d at 627; Gilday v. Mecosta County, ___ F.3d ___, 1997 WL 532880 3 (6th Cir. 1997). While evidence regarding the extent or lack of other limitations caused by Hunter's diabetes may be relevant to the issue of what if any reasonable accommodations Green Tree should have provided, such evidence is no longer relevant to the issue of Hunter's disability status where it has been determined that Hunter's diabetes has materially limited at least one major life activity.^[3]

Having determined that Hunter is a disabled person within the meaning of the Minnesota Human Rights Act, the next issues to be addressed are whether Hunter's alleged impairments were known to Green Tree and whether Green Tree failed to reasonably accommodate Hunter's limitations. The Complainant bears the burden of demonstrating that the disability was known to the employer. McAdams v. United Parcel Service Inc., 30 F.3d 1027, 1030 (8th Cir. 1994). Once an employer knows of an employee's disability and the employee has requested reasonable accommodations, the ADA and its implementing regulations require that the parties engage in an interactive process to determine what precise accommodations are necessary. Beck v. University of Wisconsin Board of Regents, 75 F.3d 1130, 1137 (7th Cir. 1995). In the instant matter, both sides accuse the other of not engaging in good faith in an interactive process to arrive at a reasonable accommodation. Respondent claims that Hunter did not do enough to support his request for an accommodation. Complainant, on the other hand, maintains that Hunter's request for a consistent schedule was sufficient to invoke the Minnesota Human Rights Act and that Green Tree failed to fulfill its obligations. A brief summary of both parties' arguments reveals, however, that there exists many disputed issues of material fact that necessitate this matter going forward to a contested case hearing.

Respondent argues that Hunter's only known disability was his visual impairment and that Green Tree fully and reasonably accommodated this impairment. Respondent contends that it had no knowledge or evidence of any other impairments affecting Hunter's major life activities. Accordingly, Respondent argues that it was under no obligation to provide more accommodations or to grant Hunter's requested work schedule. Respondent maintains that the Department has shown only that Hunter has the potential for future health-related limitations due to his diabetes. However, the Department has failed to show, according to Respondent, that the requested fixed work schedule was medically necessary in order to accommodate an existing material

limitation caused by Hunter's diabetes. Despite this fact, Respondent points out that Green Tree did generally accommodate Hunter's request for a consistent work schedule by assigning him to a regular 9:00 a.m. to 6:00 p.m. shift for most days.

Respondent also maintains that Green Tree requested medical verification from Hunter regarding the need for his requested work schedule, but that Hunter failed to provide it. Respondent argues that Green Tree had no duty to accommodate Hunter's request for certain work hours where Hunter failed to provide documentation to either Kelsey or Human Resources that the requested shift was medically necessary to accommodate his disability. Respondent cites to the unpublished opinion of Bergeron v. Northwest Publications Inc., No. 3-94-1124, 1996 WL 210789 (D.Minn. Jan. 12, 1996), for the proposition that an employer may request documentation of an employee's functional limitations to support a request for an accommodation where the need for the accommodation is not obvious. In Bergeron, the plaintiff sought a consistent day shift as an accommodation for his diabetes. Although the plaintiff provided letters to his employer from doctors indicating that he was required to work a consistent shift "to avoid problems in the future", the court held that plaintiff failed to show that his disability prevented him from working the hours set by his employer. Id. at 7.

Complainant, on the other hand, argues that it has put forth sufficient evidence that Hunter notified Green Tree on several occasions of his need for a scheduling accommodation. Prior to starting the job, Hunter states that he informed Solberg that he had questions about the schedule. Hunter testified that once he began working, he spoke with Kelsey and Glewwe several times about his need for a consistent schedule due to his diabetes. In addition, Hunter put his concerns about the schedule and his request for an accommodation in writing to Kelsey. Complainant also maintains that Hunter offered to provide Kelsey with medical documentation to support his accommodation request but that Kelsey declined the offer. Moreover, Complainant argues that, unlike Bergeron, it has presented sufficient evidence that Hunter's varying work schedule was causing Hunter to suffer adverse health-related consequences. Specifically, Hunter testified that when his lunch was delayed one day by 45 minutes, his blood sugar level lowered and he began to feel shaky and disoriented. Despite telling Kelsey that he needed to eat because of his diabetes, Hunter was told to keep working. (Hunter Depo at 128.) Hunter further testified that as a result of the delayed lunch, he had a "rough" afternoon and evening. (Id. at 129.)

In addition, Complainant submitted the deposition testimony of Hunter's physician, Dr. Lawrence Mulmed, to support its claim that set work hours is a reasonable accommodation for a person with diabetes. Mulmed testified that a consistent schedule of work hours is very helpful for persons with diabetes to maintain control over their glucose levels. (Id. at 27-28, 60.) Mulmed also testified that a person with diabetes can have difficulty if his or her schedule varies as little as an hour a day, unless the person has advance knowledge so that he can make preparations such as bringing insulin or food to work. (Id. at 24-26, 60). Furthermore, while Mulmed did testify that there was no medical reason why Hunter could not hold a full-time job in an office setting, he explained that this was only true if the employer allowed Hunter "extra leeway" to maintain good control over his diabetes. (Id. at 21.)

Based on a complete review of the record presented, the Administrative Law Judge finds that Complainant has put forth sufficient evidence to create genuine issues of material fact as to whether Green Tree knew of and failed to reasonably accommodate Hunter's disability. Consequently, Respondent's motion for summary disposition is denied.

B.H.J.

^[1] Complainant did not file a motion for summary disposition. At the hearing on the motion, however, both parties agreed that the issue of whether Mr. Hunter was disabled, within the meaning of the MHRA, did not involve any genuine issues of material fact and could be determined on summary disposition. Based on that stipulation, the Administrative Law Judge deemed the Department to have made a cross motion for summary disposition on that particular issue. See Del Hayes & Sons, Inc. v. Mitchell, 304 Minn. 275, 230 N.W.2d 588 (Minn. 1975)

^[2] With regard to the issue of whether Green Tree failed to provide reasonable accommodation to Mr. Hunter, the Administrative Law Judge will view the facts in the light most favorable to the Department, which is the non-moving party. See p. 4, *infra*.

^[3] In its submissions and argument, Green Tree suggests that an employer's obligation to provide reasonable accommodation might only extend to those features of an employee's disability that resulted in the employee being classified as disabled for purposes of the MHRA – i.e., in this case, Mr. Hunter's visual impairment. But it is premature and unnecessary for the Administrative Law Judge to address that legal issue, in the abstract, at this stage of the proceedings – that is, before factual findings are made on such issues as the extent to which other symptoms of Mr. Hunter's diabetes may have impaired his ability to engage in work activities, the extent to which he notified Green Tree about impairments other than his visual impairment, etc.