

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

Joseph Bieker,

Complainant,

v.

Novartis Nutrition Corporation, a
Delaware corporation,

Respondent

ORDER ON MOTION FOR
SUMMARY DISPOSITION

The above-entitled matter came before Administrative Law Judge (ALJ) Bruce H. Johnson on Respondent Novartis Nutrition Corporation's motion for summary judgment. Novartis filed its motion on March 24, 2000. Mr. Bieker filed a reply memorandum in opposition to the motion on May 8, 2000. At the request of the ALJ, the parties filed supplemental memoranda on May 22, 2000. The record closed on May 22, 2000.

Peter O. Hughes, Esq., Stanton, Hughes, Diana, Salsberg, Cerra & Mariani, P.C., 10 Madison Avenue, Suite 402, Morristown, New Jersey 07960 and Susan L. Segal, Esq., 508 East Parkdale Plaza Building, 1660 South Highway 100, Minneapolis, Minnesota 55416 represented Respondent Novartis Nutrition Corporation ("Novartis"). William B. Butler, Esq., 4100 Multifoods Tower, 33 South Sixth Street, Minneapolis, Minnesota 55402, represented Complainant Joseph Bieker.

Based upon the file, record, and proceedings herein, and for the reasons set forth in the accompanying Memoranda, the Administrative Law Judge makes the following:

ORDER

That Respondent's motion for summary disposition is denied without prejudice.

Dated this ____ day of May 2000.

BRUCE H. JOHNSON
Administrative Law Judge

MEMORANDUM

Underlying Facts

Complainant Joseph Bieker began working for Novartis as a sales representative in August 1996. Complainant's territory was called the "Minnesota District" and was part of the central region territory for Novartis. In 1997, [NAME REDACTED] was made the District Manager for the Minnesota District and Mr. Bieker's direct supervisor. Mr. [NAME REDACTED] reported to Novartis Regional Manager Gary White. On November 4, 1997, Mr. Bieker complained in writing to Karen Gallivan (then vice-president of human resources and general counsel at Novartis) about Mr. [NAME REDACTED]'s "unfair treatment" and "bias, especially toward young females".¹ Mr. Bieker alleged that Mr. [NAME REDACTED] on more than one occasion referred to Mr. Bieker as "old" and/or "washed up". And Mr. Bieker alleged that Mr. [NAME REDACTED] made general comments regarding who among the female staff he would like to have sex with and why. On November 10, 1997, Gary White and [NAME REDACTED] met with Mr. Bieker and advised him that, due to a company restructuring, his employment with Novartis was being terminated as of November 21, 1997. Mr. Bieker filed a charge of discrimination with the Minnesota Department of Human Rights on November 20, 1998, alleging age and gender discrimination, and reprisal.

Contentions of the Parties

Novartis argues that Mr. Bieker's claim is barred by the one-year statute of limitations applicable to claims brought under the Minnesota Human Rights Act. Novartis maintains that Minnesota law is well settled that the statute of limitations begins to run from the time notice of termination is received by the employee. In this matter it is not disputed that Mr. Bieker was notified on November 10, 1997 that Novartis intended to discharge him. Consequently, according to Novartis, Mr. Bieker was required to file his charge of discrimination by November 10, 1998. Because he did not do so, Novartis contends that Mr. Bieker's claim is barred by the statute of limitations and must be dismissed.

Mr. Bieker puts forth two arguments in response to Novartis' motion. First, Mr. Bieker argues that by failing to plead the statute of limitations as an affirmative defense, the defense is waived and Novartis cannot raise it now. Second, Mr. Bieker contends that, pursuant to Minn. Stat. § 363.06, subd. 3 (1998), the running of the one-year limitation period was suspended while his complaint of possible age and gender bias on the part of Mr. [NAME REDACTED] was being investigated by Novartis' human resources department. Mr. Bieker points out that the former human resources director for Novartis

¹ Complainant's Ex. 2.

testified at her deposition that she was given his complaint to investigate on November 13, 1997 and that she did not conclude the investigation until sometime after December 17, 1997. Consequently, Mr. Bieker asserts that his filing of a charge with the Department of Human Rights on November 20, 1998 was timely.

Scope and Standard of Review

Summary disposition is the administrative equivalent of summary judgment in district court practice. Summary disposition is appropriate in cases where there is no genuine dispute about the material facts, and one party must necessarily prevail when the law is applied to those undisputed facts.² When considering and deciding motions for summary disposition in contested case proceedings, the Office of Administrative Hearings has generally followed the standards and criteria that have emerged in practice under the Minnesota Rules of Civil Procedure for motions for summary judgment.³ There, a genuine issue is considered to be one that is not a sham or frivolous, and a material fact is one that is substantial and whose resolution will affect the result or outcome of a claim.⁴

The moving party has the initial responsibility of presenting evidence that establishes a prima facie claim and of showing that no material fact is in dispute.⁵ One way of successfully resisting a motion for summary disposition of a particular claim is for the nonmoving party to show that some specific facts are in dispute that bear on the outcome of that claim.⁶ Although the evidence presented to defeat a summary disposition motion need not be in a form that would be admissible at the hearing, the nonmoving party must establish the existence of a genuine issue of material fact by substantial evidence. General claims or contentions about factual disputes are not enough to meet the burden.⁷ Finally, when considering a motion for summary disposition, an administrative law judge or an agency must view the facts in the light most favorable to the non-moving party.⁸ Put yet another way, if reasonable people could differ about the evidence's meaning under the law, an administrative law judge or an agency should not grant summary disposition.⁹ This means that if the outcome of a

2 Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955); Minn. R. pt. 1400.5500K (unless otherwise specified, all references to Minnesota Rules are to the 1997 edition); Minn. R. Civ. P. 56.03.

3 Minn. R. Civ. P. 56; compare Minn. R. pt. 1400.6600.

4 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), *rev. denied* (Minn. 1985).

5 Thiele v. Stitch, 425 N.W.2d 580, 583 (Minn. 1988).

6 *Id.*; Hunt v. IBM Mid America Employees Federal, 384 N.W.2d 853, 855 (Minn. 1986).

7 *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, 715 (Minn. App. 1988), *citing* Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

8 Ostendorf v. Kenyon, 347 N.W.2d 834 (Minn. App. 1984).

9 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-55 (1986).

claim turns on the weight to be given conflicting evidence or on the credibility of witnesses supplying testimony necessary to establish material facts, summary disposition is inappropriate.¹⁰

Waiver of defense

Mr. Bieker argues that because Novartis' failed to plead statute of limitations as an affirmative defense, the defense is waived. He points out that Novartis did not raise the statute of limitations defense in either its January 28, 1999 response to his discrimination charge filed with the Department of Human Rights, or in its answer to his complaint filed on October 11, 1999. According to Mr. Bieker, Minnesota Rules of Civil Procedure 8.03 mandates that Novartis' statute of limitations defense be deemed waived.

In ruling on motions where the rules governing contested case proceedings are silent, the Administrative Law Judge shall apply the Rules of Civil Procedure "to the extent that it is determined appropriate in order to provide a fair and expeditious proceeding."¹¹ Rule 8.03 of the Minnesota Rules of Civil Procedure requires that affirmative defenses such as the statute of limitations be pleaded in a responsive pleading. If the affirmative defense is not pleaded, the defense is waived. Yet, even if a statute of limitations defense is not properly pleaded in the answer, the trial court has broad discretionary powers to permit a party to amend its pleadings.¹² And Minnesota courts have held that, based on this discretion, a statute of limitations defense may be raised by motion for summary judgment, to dismiss, or for judgment on the pleadings.¹³ Moreover, administrative hearings are less formal than court trials and are not governed by strict rules of evidence or procedure.¹⁴ And, as noted above, the ALJ need apply the Rules of Civil Procedure only where it promotes fairness. Accordingly, the Administrative Law Judge finds that Novartis may raise the statute of limitations defense by motion for summary disposition.

Tolling of one-year period

The substantive issue before the Administrative Law Judge is whether Mr. Bieker's discrimination claim is barred by the one-year statute of limitations provided for in the Minnesota Human Rights Act. The ALJ initially notes that, although a statute of limitations issue is traditionally a question of law, it can also be a question of fact.¹⁵ The Minnesota Human Rights Act provides that "[a]

¹⁰ *Id.*

¹¹ Minn. R. 1400.6600.

¹² *Oreck v. Harvey Homes, Inc.*, 602 N.W.2d 424, 427-28 (Minn. App. 1999); *O'Reilly v. Allstate Ins. Co.*, 474 N.W.2d 221, 223 (Minn. App. 1991).

¹³ *Erickson v. Winnebago, Indus., Inc.*, 342 F.Supp. 1190, 1194 (D.Minn. 1972).

¹⁴ *E.g.*, Minn. R. 1400.7300, subp.1, provides that admissible evidence may include "reliable" hearsay.

¹⁵ *Costilla v. State*, 571 N.W.2d 587, 593 (Minn. App. 1997) *rev. denied* (Minn. Jan. 28, 1998) (genuine issues of material fact precluded summary judgment as to whether state's responses to sexual harassment were timely and appropriate for purposes of prima facie case), *citing*, *Grondahl v. Bulluck*, 318 N.W.2d 240, 242-43 (Minn. 1982) (in

claim of unfair discriminatory practice must be brought as a civil action ... within one year after the occurrence of the practice.”¹⁶ In *Turner v. IDS Financial Services, Inc.*¹⁷, the Minnesota Supreme Court clarified that the statute of limitations begins to run from the time the notice of termination is received by the employee and not from the time the termination actually occurs. In this matter, Mr. Bieker received notice of his termination on November 10, 1997.

Yet, the Act also provides for a tolling of the one-year period during the time the parties voluntarily engage in a dispute resolution process. Specifically, Minn. Stat. § 363.06, subd. 3, states:

The running of the one-year limitation period is suspended during the time a potential charging party and respondent are voluntarily engaged in a dispute resolution process involving a claim of unlawful discrimination under this chapter, including arbitration, conciliation, mediation or grievance procedures pursuant to a collective bargaining agreement or statutory, charter, ordinance provisions for a civil service or other employment system or a school board sexual harassment or sexual violence policy.

Mr. Bieker filed a written complaint on November 4, 1997 with Novartis’ human resources department regarding Mr. [NAME REDACTED]’s “unfair treatment”, and listed specific examples of statements allegedly made by Mr. [NAME REDACTED] that reflect age and gender bias. According to Novartis’ Employee Code of Conduct, “[e]very inquiry and complaint an employee makes will be taken seriously. Each will be fully investigated on the merits and the employee will be provided general information about its resolution.”¹⁸ On November 10, 1997, Mr. Bieker received notice of his termination. The question is, did Mr. Bieker’s submission of a written complaint to Novartis’ human resources department and the subsequent investigation suspend the running of the one-year statute of limitations period, at least until November 20, 1998?

According to the deposition testimony of Tracy Roberts, Karen Gallivan gave her Mr. Bieker’s written complaint to investigate on or about November 13, 1997. At the time, Ms. Roberts was the director of human resources at Novartis. Ms. Roberts testified that she attempted to reach Mr. Bieker by telephone without success on November 17 and 18, 1997, and that she finally spoke with him on November 19, 1997.¹⁹ According to Ms. Roberts, Mr. Bieker discussed only the company’s incentive plan and his bonus calculation during this telephone conversation.²⁰ Mr. Bieker promised to discuss with Ms. Roberts the issues

medical malpractice action, where disputed questions of material fact exist as to when treatment ceased, statute of limitations question is decided by jury).

16 Minn. Stat. § 363.06, subd. 3 (1998).

17 471 N.W.2d 105, 108 (Minn. 1991).

18 Complainant Ex. 1.

19 Complainant Ex. 8, Roberts Depo. at 21.

20 Id. at 22.

raised in his complaint letter, but he refused to do so over the telephone.²¹ Ms. Roberts also testified that after she spoke with Mr. Bieker, she met with Gary White and Mr. [NAME REDACTED] regarding Mr. Bieker's complaint.²² Mr. [NAME REDACTED] denied that he made ageist or sexist remarks.²³ Nevertheless, in response to Mr. Bieker's allegations, Novartis accelerated the timing of Mr. [NAME REDACTED]'s required management training seminar on basic skills and legal considerations.²⁴ Ms. Roberts further testified that she met briefly with Mr. Bieker on December 2, 1997. On that day, Mr. Bieker told her that he did not have enough time to discuss his complaint issues, but he said that he would schedule another meeting with her to do so.²⁵ In a December 17, 1997 letter to Mr. Bieker, Ms. Roberts noted that she had not heard from Mr. Bieker since their December 2nd conversation and she encouraged him to call her if he wanted to provide her with "any additional information".²⁶ Ms. Roberts testified that she never heard from Mr. Bieker again. It is Ms. Roberts' opinion that Mr. Bieker refused to cooperate with the investigation and, as a result, she closed her investigation without reaching any conclusions regarding Mr. [NAME REDACTED]'s conduct.²⁷ Ms. Roberts testified at her deposition that it would be fair to state that she ended her investigation of the complaint sometime after December 17, 1997.²⁸

Mr. Bieker argues that Ms. Roberts' testimony supports a finding that at least as late as December 17, 1997, he and Novartis were engaged in a process to resolve the complaint he filed concerning Mr. [NAME REDACTED]'s alleged discriminatory conduct. Moreover, Mr. Bieker testified at his deposition that he has no recollection of Ms. Roberts informing him that she was the one in charge of the investigation.²⁹ Instead, Mr. Bieker stated that because he had addressed his complaint letter to Karen Gallivan, the vice president of human resources, he fully expected that Ms. Gallivan would contact him.³⁰ Mr. Bieker believed that other employees had also complained about Mr. [NAME REDACTED]'s conduct and it was his expectation that Ms. Gallivan would investigate his complaint internally.³¹ Mr. Bieker further testified that he was worried about his job security and that it was his expectation that by "going on record" regarding Mr. [NAME REDACTED]'s conduct he would save his job and improve the work environment.³² In fact, Mr. Bieker stated that he remained hopeful until the date

21 Id. at 22.

22 Id. at 24-26.

23 Id.

24 Complainant's Ex. 8, Roberts Depo at 27-28, 57.

25 Id. at 22-23.

26 Complainant Ex. 13.

27 Complainant's Ex. 8, Roberts Depo at 57-58.

28 Complainant Ex. 8, Roberts Depo. at 49.

29 Complainant's Ex. 4, Bieker Depo. at 158, 160.

30 Id. at 157-159.

31 Id. at 146-147.

32 Id. at 144-148, 205-206.

of his termination that he would receive a response from Ms. Gallivan regarding the status of the investigation into his complaint.³³ According to the company's Code of Conduct, Novartis will fully investigate each complaint and provide general information to the employee regarding its resolution. Mr. Bieker maintains that the one-year statute of limitations provided for in Minn. Stat. § 363.06, subd. 3, was suspended during the period his complaint was being investigated, which was at least until some time in December of 1997. Accordingly, Mr. Bieker contends that his action was commenced within the extended time and is not time-barred.

Initially, the ALJ must determine whether Mr. Bieker's internal complaint and the subsequent investigation qualifies as a "dispute resolution process" under Minn. Stat. § 363.06, subd. 3. It could be argued that the statute's list of dispute resolution processes that toll the time period is exclusive. That is, by listing only "arbitration, conciliation, mediation or grievance procedures" the Legislature was excluding all other types of proceedings from being considered dispute resolution processes. It can also be argued that since the four dispute resolution examples listed are all structured, formal proceedings, an internal complaint process is not similar enough to be included. Yet, the word "including" which precedes the list of dispute resolution examples mentioned in Minn. Stat. § 363.06, subd. 3, is not usually a word of limitation. Rather, the word "including" has the meaning of "in addition to", suggesting that the examples given are simply an illustrative application of the general principle.³⁴ Moreover, Minn. Stat. § 363.11 specifically requires that the provisions of the Minnesota Human Rights Act be construed liberally to achieve the Act's purposes.

The ALJ determines that based on a liberal construction of the provisions of the Human Rights Act, Mr. Bieker's internal complaint was a dispute resolution process for purposes of Minn. Stat. § 363.06, subd. 3. It is the intent of the tolling statute to encourage parties to attempt to resolve their disputes by alternative methods. It would be contrary to this expressed intent to penalize Mr. Bieker for attempting to informally resolve his complaint through the use of Novartis' internal process. Respondent cites to several federal cases where the courts have held that resort to grievance procedures does not toll the period for filing a charge with the EEOC.³⁵ Although principles developed by federal courts in Title VII cases are instructive and may be applied when interpreting the Minnesota Human Rights Act³⁶, these cases are not persuasive when Title VII does not contain a similar tolling provision. Unlike the MHRA, Title VII encourages alternative means of dispute resolution, including "settlement negotiations, conciliation, facilitation, mediation, fact-finding mini-trials and

33 Id. at 199-200.

34 Black's Law Dictionary 687 (5th ed. 1979); *Argo Oil Corp. v. Lathrop*, 72 N.W.2d 431 (S.D. 1955).

35 See, e.g., *Sendall v. Boeing Helicopters*, 827 F.Supp. 325, 330 (E.D. Pa. 1993) *aff'd*, 22 F.3d 303 (3rd. Cir. 1994) (belief that employer was giving serious consideration to employee's grievances during pendency of internal investigation insufficient to support claim for equitable tolling.).

36 *Fahey v. Avnet, Inc.*, 525 N.W.2d 568, 572 (Minn. App. 1994).

arbitration”³⁷, but it does not specifically toll the running of the limitations period when the parties are engaged in a dispute resolution process. Instead, plaintiffs in Title VII cases must seek to excuse their late filing of charges on equitable grounds. And, absent active deception on the part of the employer, the argument for equitable tolling seldom succeeds.³⁸

In the instant matter, Mr. Bieker’s filing of a written internal complaint and Novartis’ assurance of an investigation and resolution is not unlike a conciliation process. The ALJ concludes that Mr. Bieker’s filing of a written complaint with Novartis’ human resources department was a “dispute resolution process” for purposes of Minn. Stat. § 363.06, subd. 3. And, provided that the parties were truly engaged in the process and that Mr. Bieker’s internal complaint was sufficiently connected to the subject matter of the discrimination charge he filed with the Department of Human Rights, the complaint process tolled the running of the statute of limitations from November 10, 1997 until at least November 20, 1998.

In two recent unpublished opinions, the Minnesota court of appeals has addressed the tolling provision of the Minnesota Human Rights Act. And in both decisions, the court indicated that in order to toll the statutory time period, the identified dispute resolution process must have sufficiently involved or at least considered the conduct or practices alleged in the underlying claim of discrimination. In *Afolayan v. Moorhead State University*³⁹, the court found that the statute of limitations was tolled during grievance and arbitration proceedings concerning a professor’s suspension and subsequent discharge from Moorhead State University. After the arbitrator found that there was not just cause to discharge the professor, and reversed the university’s decision, the professor sued the university for racial discrimination. The alleged discrimination occurred on September 8, 1995 and the arbitrator’s decision was issued on July 28, 1996. The professor filed his lawsuit on June 20, 1997. The university argued that the statute of limitations period was not tolled because the discrimination claim was not part of the grievance or arbitration proceedings and, in fact, the arbitrator had no jurisdiction over discrimination claims. The court found, however, that there were sufficient references to disparate treatment issues to support an inference that racial discrimination was part of the grievance and arbitration proceedings. Accordingly, the court found that the one-year period was tolled during the grievance and arbitration processes.

And in *Henry v. University of Minnesota*⁴⁰, the court of appeals determined that the University was entitled to summary judgment where an employee received notice on June 16, 1994 that his position would be terminated but did not file a charge alleging discrimination based on race and reprisal until July 20, 1995. The court held that the employee failed to file his

37 Civil Rights Act of 1991, § 118 (amending Title VII and other federal laws affected by the Act).

38 See generally, Larson, *Employment Discrimination*, vol. 4 §72.06 (2d. ed. 1995).

39 1998 WL 798879, unpublished (Minn. App. 1998).

40 1999 WL 486825, unpublished (Minn. App. 1999).

claim of unfair discrimination within the statutory time period. The employee had argued that the one-year period should be tolled because the parties had engaged in a grievance procedure. The court determined, however, that the grievance procedure that the parties engaged in concerned only the employee's salary and did not involve a claim of unlawful discrimination. Specifically, the grievance procedure encompassed only whether the University had properly followed its guidelines for granting raises and terminating employee positions, and whether the University had breached an implied contract of continuing employment with the employee. The court stated that any collateral discussion regarding the University's commitment to diversity did not convert the grievance procedure into a review of the specific racially discriminatory practices alleged by the employee. The court explained that:

“a dispute resolution process must have a logical connection to the subject matter of a lawsuit under the MHRA in order to toll the statute of limitations. A party cannot use the dispute resolution process merely as a vehicle to investigate and test the viability of a cause of action.”⁴¹

Even though these two decisions are not authoritative, the ALJ believes that the underlying logic is instructive. In the instant matter, there is a logical connection between Mr. Bieker's internal complaint and the discrimination charge he filed with the Department of Human Rights. Both allege age and gender bias and unfair treatment on the part of Mr. [NAME REDACTED]. The more difficult issue to determine, however, is whether Mr. Bieker was truly engaged in a dispute resolution process with Novartis sufficient to toll the running of the one-year time period. The tolling statute operates only if the parties were truly “engaged in a dispute resolution process involving a claim of discrimination.”⁴² It is not sufficient to merely allude to discrimination without “actually actively using the process in an effort to resolve the claim.”⁴³

Novartis argues that on several occasions Tracy Roberts attempted to talk to Mr. Bieker regarding the allegations contained in his November 4th letter, but that Mr. Bieker refused to talk with her. Because Ms. Roberts was never able to discuss with Mr. Bieker the issues he raised, she eventually ended her investigation without reaching any conclusions regarding Mr. [NAME REDACTED]'s conduct. Novartis contends that Mr. Bieker is not entitled to tolling of the statute of limitations where he completely failed to cooperate in the investigation of his own complaint. Mr. Bieker, on the other hand, testified at his deposition that he does not recall being informed that Ms. Roberts was conducting the investigation. Instead, Mr. Bieker believed that, since he had addressed his complaint to Ms. Gallivan, it would be Ms. Gallivan who would

41 *Id.* at **2; See, AFSCME Dist. Council No. 14 v. Minneapolis Community Dev. Agency, 520 N.W.2d 453, 455, n. 1 (Minn. App. 1994) (statute of limitations would be tolled if matter in arbitration involved a claim of unlawful discrimination under MHRA).

42 *Afolayan*, supra note 39, 1998 WL 798879 at **3.

43 *Id.*

handle his complaint. In fact, Mr. Bieker testified that until the date of his termination, he expected that Ms. Gallivan would contact him.

Based on a liberal construction of the provisions of the Human Rights Act, the ALJ finds that Mr. Bieker's internal complaint was a dispute resolution process within the meaning of Minn. Stat. § 363.06, subd. 3. The ALJ further finds that genuine issues of material fact exist as to whether both parties were "truly engaged" in that process and whether the one-year statutory time period was therefore tolled until at least November 20, 1998. Novartis' motion for summary disposition is denied at this time with the understanding that the motion may be renewed at the close of the presentation of the evidence at the hearing.

B.H.J.