

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Denise E. Blanks,

Complainant,

VS.
JUDGEMENT

ORDER REGARDING-RESPONDENT'S
MOTION FOR SUMMARY

Crystal Foods, Inc.,

Respondent.

This matter is before Administrative Law Judge Barbara L. Neilson on a Motion for Summary Judgment filed by the Respondent. Jeffrey H. Olson, Attorney at Law, Harvey, Thorfinnson & Lucas, P.A., Marquette Bank Building, Suite 400, 6640 Shady Oak Road, Eden Prairie, Minnesota 55344 appeared on behalf of the Complainant, Denise E. Blanks. Trevor R. Walsten, Attorney at Law, Maun & Simon, 2300 World Trade Center, 30 East Seventh Street, St. Paul, Minnesota 55101-4904, appeared on behalf of the Respondent, Crystal Foods, Inc. ("Crystal Foods"). The Administrative Law Judge informed counsel by letter dated March 12, 1993, of her intention to deny the Respondent's motion and provide a later written ruling.

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

ORDER

The Respondent's Motion for Summary Judgment is hereby DENIED.

Dated: March 18 1993.

BARBARA L. NEILSON
Administrative Law Judge

In her Amended Complaint in this matter, the Complainant alleges that Crystal Foods discriminated against her on the basis of sex in terms and conditions of employment with respect to compensation, pay raises, and "promotions and deference for similar work and similar position as was held by men that was not given." Amended Complaint, paragraph 6. She also alleges that Crystal Foods harassed and belittled her and otherwise engaged in acts of reprisal against her for complaining of several sexual solicitation incidents by her supervisor. Id. In its Motion for Summary Judgment, Crystal Foods argues that the Complainant cannot demonstrate the requisite prima facie elements of any of her claims and that her claims are barred by the statute of limitations.

Summary disposition is the administrative equivalent of summary judgment. Minn. Rules pt. 1400.5500(K). Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Sauter v. Sauter 70 N.W.2d 351, 353 (Minn. 1955); Louwagie v. Witco Chemical Corp. 378 N.W.2d 63, 66 (Minn.App. 1985); Minn. R. Civ. P. 56.03 (1984). 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. 1 978) ; Highland Chateau v. Minnesota Department of Public Welfare, 356 N.W. 2d 804, 808 (Minn. Ct. App. 1984).

The moving party, in this case Crystal Foods, has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary disposition, the nonmoving party, in this case the Complainant, must show that specific facts are in dispute which have a bearing on the outcome of the case. Hunt v. IBM Mid America Employees 384 N.H.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 (1976); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. Ct. 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)). The nonmoving party also has the benefit of that view of the evidence which is most favorable to him, and all doubts and inferences must be resolved against the moving party. *ate*, 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); *Dollander v. Rochester State Hospital*, 362 N.W.2d 386, 389 (Minn. Ct. App. 1985).

Based upon the pleadings, affidavits, and depositions submitted in this matter, and construing the facts in a light most favorable to the Complainant, the underlying facts in this matter appear to be as follows. Ms. Blanks learned of an opening at Crystal Foods through a "head hunter." Prior to being employed by Crystal Foods, she completed a form for the head hunter which indicated that she was not interested in relocating due to her husband's job. Ms. Blanks was hired by Crystal Foods on May 16, 1988, as a Regional Manager, and remained in that position until July 23, 1991, when she

resigned. She experienced pre-term labor during a pregnancy which occurred during her employment at Crystal Foods and took a disability and maternity leave of absence from August 14, 1989, to February 1, 1990. In June of 1991, Crystal Foods selected Jeffrey Robertson to fill the position of Director of National Accounts and Senior Regional Manager in Ohio.

Regional Managers typically supervised three to four Sales Representatives, although eight Sales Representatives reported to Ms. Blanks during a portion of 1989 when she was the only Regional Manager in the Minnesota region. Ms. Blanks' initial salary was \$35,000, with a \$1,500 signing bonus. She was considered a probationary employee during the first six months of her employment. Ms. Blanks received the following raises during the course of her employment with Crystal Foods:

November 21, 1988	\$38,000.00
May 29, 1989	40,000.00
September 17, 1990	42,000.00

She also received a car allowance of \$300 per month after May 29, 1989, and \$375 per month after September 17, 1990, and bonuses in the amounts of \$7,206 in 1990 and \$5,475 in 1991. Her W-2 Wage and Tax Statements reflect "wages, tips, other compensation" in the amount of \$23,269.18 in 1988, \$46,324.67 in 1990, and \$32,872.48 in 1991.

In her affidavits filed in this matter and her underlying discrimination charge filed with the Department of Human Rights, Ms. Blanks has attested that her direct supervisor, Donald Goldberg, who was the Vice President of Sales of Crystal Foods, made several comments to her which were sexual in nature while accompanying her on business trips during the summer of 1988. Ms. Blanks reported these comments to Stuart Friedell, the Chief Executive Officer of Crystal Foods, and Greg Murch, the President of Crystal Foods. She asserts that Mr. Friedell informed Mr. Goldberg of her complaints, that Mr. Goldberg confronted her regarding the complaints, and that Mr. Goldberg's behavior became worse after her complaints. Ms. Blanks further attests that Mr. Friedell engaged in several acts of reprisal against her between 1989 and May of 1991. She has detailed several of these alleged acts of reprisal in Exhibit A to her most recent Affidavit. Ms. Blanks alleges that she was able to continue to perform her job with great difficulty but that the reprisals

created a hostile and intimidating environment at Crystal Foods. She asserts that she eventually was constructively discharged from her position in July of 1991. She did not file a charge of discrimination with the Minnesota Department of Human Rights until October 2, 1991.

The Minnesota Human Rights Act ("MHRA" or "the Act") specifies that, except when based on a bona fide occupational qualification, it is an unfair employment practice for an employer to discharge an employee because of sex or otherwise discriminate against an employee because of sex with respect to "hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment." Minn. Stat. 363.03, subd. 1(2) (1992). The MHRA specifies that discrimination based on sex includes "sexual harassment." Minn. Stat. 363.01, subd. 14 and 10a (1992). "Sexual harassment" is defined in the statute as follows:

"Sexual harassment" includes unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when:

(1) submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining employment..... ;

(2) submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's employment . . . ; or

(3) that conduct or communication has the purpose or effect of substantially interfering with an individual's employment..... or creating an intimidating, hostile, or offensive employment..... environment; and . . . the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action.

Minn. Stat. 363.01, subd. 41 (1992). The Act further provides that it is an unfair discriminatory practice for an employer "to intentionally engage in any reprisal against any person because that person..... [o]pposed a practice forbidden under this chapter Minn. Stat. 363.03, subd. 7 (1992).

The MHRA defines a reprisal to include "any form of intimidation, retaliation, or harassment" as well as a "departure from any customary employment practice." id.

Minnesota courts have often relied upon federal case law developed in discrimination cases arising under Title VII of the Civil Rights Act of 1964 and the Equal Pay Act in interpreting the MHRA. Relevant Minnesota case law establishes that plaintiffs in employment discrimination claims arising under the Act may prove their case either by presenting direct evidence of discriminatory intent or by presenting circumstantial evidence in accordance with the analysis first set out by the United States Supreme Court in *McDonnell Douglas Corp, v. Green*, 411 U.S. 792, 802-03 (1973). *Feges v. Perkins Restaurants, Inc.*, 483 N.W.2d 701, 710 & n.4 (Minn. 1992); *Sigurdson v. Isanti County*, 386 N.W.2d 715, 719 (Minn. 1986); *Danz v. Jones*, 263 N.W.2d 395, 399 (Minn. 1978).

The approach set forth in *McDonnell Douglas* consists of a three-part analysis which first requires the complainant to establish a prima facie case of disparate treatment based upon a statutorily-prohibited discriminatory factor. Once a prima facie case is established, a presumption arises that the respondent unlawfully discriminated against the complainant. The burden of producing evidence then shifts to the respondent, who is required to

articulate a legitimate, nondiscriminatory reason for its treatment of the complainant. If the respondent establishes a legitimate, nondiscriminatory reason, the burden of production shifts back to the complainant to demonstrate

that the respondent's claimed reasons were pretextual. McDonnell Douglas, 411

U.S. at 802-00 sit Also Texas Department of Community Affairs v. Burdine 450 U.S. 248 (1981); Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978);

Anderson v. Hunter, Keith, Marshall & Co. 417 N.W.2d 619, 623 (Minn. 1989);
Hubbard v. United Press International Inc. 330 N.W.2d 428 (Minn. 1983).
Indirect proof of discrimination is permissible to show pretext, since "an employer's submission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred." Haglof v. Northwest Rehabilitation Inc., 910 F.2d 492, 494 (8th Cir. 1990), quoting MacDissi v. Valmont Industries Inc., 856 F.2d 1054, 1059 (8th Cir. 1988). The burden of proof remains at all times with the complainant.
Fisher Nut Co. v. Lewis rel. Garcia, 320 N.W.2d 731 (Minn. 1982); Lamb v. Village of Bagley, 310 N.W.2d 508, 510 (Minn. 1981).

It is clear that the three-part analysis is to be applied in deciding summary judgment motions involving claims alleging disparate treatment in violation of the MHRA. Albertson v. FMC Cora., 437 N.W.2d 113, 115 (Minn. Ct. App. 1989), citing Sigurdson v. Isanti County 386 N.W.2d 715, 719-22 (Minn. 1986); see also Rademacher v. FMC Corp. 431 N.W.2d 879, 882 (Minn. Ct. App. 1988); Shea v. Hanna Mining Co. 397 N.W.2d 362, 368 (Minn. Ct. App. 1986). The U.S. Court of Appeals for the Eighth Circuit has cautioned that "[s]ummary judgments should be sparingly used [in cases alleging employment discrimination] and then only in those rare instances where there is no dispute of fact and where there exists only one conclusion. . . . All the evidence must point one way and be susceptible of no reasonable inference sustaining the position of the non-moving party."
Johnson v. Minnesota Historical Society 931 F.2d 1239, 1244 (8th Cir. 1991).
relying upon Hillebrand v. M-Tron Industries Inc, 827 F.2d 363, 364 (8th Cir. 1987), cert. denied 488 U.S. 1004 (1989), and Holley v. Sanyo Manufacturing, Inc., 771 F.2d 1161, 1164 (8th Cir. 1985).

The elements of a prima facie case of discrimination vary depending upon the type of discrimination alleged, and must be tailored to fit the particular circumstances. The Complainant's claims in the present case fall into the primary categories of wage discrimination and unlawful reprisal. I/ In order to demonstrate a prima facie case of sex discrimination in compensation, the

Complainant must provide proof that the employer pays 'different wages to employees of opposite sexes for equal work on jobs the performance of which requires equal skills, effort and responsibility.'" Danz v. Jones , 263 N.W.2d 395, 399-400 (Minn. 1978), quoting Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974) (arising under the Equal Pay Act); Kolstad v. Fairway Foods, Inc. 457 N.W.2d 728, 734 (Minn. Ct. App. 1990). Wage differentials "are not unlawful in Minnesota if they are based upon a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a wage differential based on any factor other than sex." Kolstad, 457 N.W.2d at 734, citing 29 U.S.C. 206(d)(1) and Minn. Stat. 181.67, subd. I.

I/ At the prehearing conference held in this matter, counsel for the Complainant admitted that Mr. Goldberg's alleged sexual comments were not made during the one-year limitations period set forth in the MHRA. Any claim of sexual harassment per se thus would be time-barred in this case. Because it is the understanding of the Administrative Law Judge that such a claim will not be raised in this case, it is unnecessary to address the portion of the Respondent's motion seeking summary judgment with respect to any sexual harassment claims.

Based upon the application of the standards set forth above and construing the evidence in a light most favorable to the nonmoving party, the Administrative Law Judge concludes that Ms. Blanks has presented sufficient facts at this stage of the proceedings to support a prima facie case of wage discrimination. It is not disputed that Ms. Blanks is a member of a protected class. She has provided evidence that she and the other Regional Managers performed substantially the same job with substantially equal skills, effort, and responsibility. Andrews Affidavit at 5; Andrews Supplemental Affidavit at 6, 7, 9, 10; Blanks Affidavit at 4, 7. Finally, Ms. Blanks has provided evidence to support a determination that the compensation received by male Regional Managers employed by Crystal Foods substantially exceeded the amounts she received. For example, Michael Johnson (who was initially employed by Crystal Foods in 1982 as a Sales Representative, was promoted to Regional Manager on June 15, 1987, became a consulting Regional Manager in the national division on June 26, 1989, and was promoted to Director of National Sales and Marketing in January of 1991) received annual compensation 2/ of \$95,308.38 in 1988, \$84,467.95 in 1989, and \$78,986.40 in 1990. His salary when he became Regional Sales Manager in 1989 was set at \$65,000, with a car allowance of \$300 per month. Gary Bales was first employed by Crystal Farms as a Regional Sales Manager on August 21, 1989, and was promoted to Director of Sales on October 15, 1990. He was initially hired at \$48,000, with a 10% increase within nine months, a \$2,000 signing bonus, and a monthly car allowance of \$300. While still a Regional Sales Manager, he received a salary increase on May 14, 1990, to \$52,800 with a monthly car allowance of \$300 per month. Evidence that another female Regional Manager was paid less than the male comparatives and that two male Sales Representatives with lesser responsibilities than Regional Managers received greater compensation than Ms. Blanks provides additional support for an inference of sex-based wage discrimination. 3/ The facts alleged by the Complainant, if proven at the hearing, are thus sufficient to demonstrate a prima facie case of sex-based wage discrimination. 4/

2/ This amount is reflected on Mr. Johnson's W-2 form in the category of "wages, tips, other compensation." It does not include the amount set forth in the separate W-2 category labelled "other compensation."

3/ Michelle Chez was hired as a Regional Manager on February 26, 1990, at a salary of \$43,000, with a \$2,000 signing bonus and a car allowance of \$300 per month. On December 1, 1990, her salary was increased to \$45,000. She received a bonus of \$6,288 in 1990 and \$6,087 in 1991. Richard Korbelt was first employed by Crystal Farms as a Sales Representative in 1984. Based upon Crystal Farms' W-2 Wage and Tax Statements, Mr. Korbelt received annual compensation of \$54,365.30 in 1988 and \$43,825.07 in 1989. L. Jeffrey Robertson (who was first employed by Crystal Farms as a Sales Representative on or about March 6, 1989, was promoted to Field Sales Supervisor in November, 1990, and was promoted to District Sales Manager in June of 1991) received annual compensation of \$48,197.76 in 1991.

4/ The Complainant has not directly addressed in her memorandum her apparent claim that Crystal Foods discriminated against her when it failed to transfer her to the Ohio position in June of 1991. In her deposition, Ms. Blanks asserted that the Respondent does not post or [continued on next page]

Crystal Foods argues that any salary disparity between the Complainant and male Regional Managers Gary Bales and Mike Johnson was a result of their greater education and experience. The company further asserts that there were problems with Ms. Blanks' performance. The Respondent thus has presented facts which, if proven at the hearing, would support an Inference that there were legitimate, nondiscriminatory reasons for the wage differentials. The Complainant has, however, made a sufficient showing that there are genuine issues of material fact as to whether these reasons are a pretext for discrimination. The Complainant and other employees have attested that her performance was equal to or superior to that of other Regional Managers. Andrews Affidavit at 5; Andrews Supplemental Affidavit at 9; Chez Affidavit at 3; Robertson Affidavit at 8; and Blanks Affidavit at 7, 9. The Complainant has also provided information which tends to show that females with college or graduate degrees have not received additional compensation. Blanks Affidavit at 6; Chez Affidavit at 4; Andrews Supplemental Affidavit at 9. Alan Andrews, the former Vice President of Sales of Crystal Foods, has supplied an affidavit in which he indicates that education did not more fully qualify someone to perform the Regional Manager's job and that Mr. Johnson's greater experience did not justify the disparity between his salary and that of Ms. Blanks. Andrews Supplemental Affidavit at 9. Mr. Andrews also attested that there was no formal system or policy or actual practice at Crystal Foods prior to May of 1989 which based compensation for Regional Managers or Sales Representatives on education, seniority, or experience in the industry and that the practice of Crystal Foods in fact appeared to be contrary to such factors being taken into consideration. He stated that, while some degree of consideration was given by Crystal Foods to experience and production after May of 1989, no systematic or formal method was in place. Andrews Supplemental Affidavit at 8, 9, 10. The Administrative Law Judge has concluded that genuine issues of material fact remain for resolution at the hearing and that summary judgment is not appropriate on the issue of disparate compensation.

[Footnote 4 continued from previous page] otherwise announce openings.
She

alleges that she found out about the Ohio position "through the grapevine" and recalls telling Mr. Bales at some point that she was interested in the position and willing to relocate, although she cannot recall whether she told him before or after she heard that Mr. Robertson had been selected.

Blanks
Deposition at 119, 192, 195-97. Given the Respondent's apparent failure to advertise or post this vacancy and the absence of evidence that Ms. Blanks was in fact aware of the vacancy prior to the date it was filled, it would not be proper to require strict adherence to the usual prima facie requirement in failure-to-promote situations that the complainant demonstrate that she applied for the position. See *Chambers v. Wynne School District*, 909 F.2d 1214 (8th Cir. 1990). Moreover, it is unclear at this stage of the proceedings whether the Complainant intends to press a failure-to-promote claim or whether she is simply using Mr. Robertson's salary in the Ohio position as further evidence that males employed in substantially similar positions received greater compensation. Based upon the depositions and affidavits filed with respect to the motion, the Judge is unable to conclude at this time that the Respondent is entitled to summary judgment on this portion of the claim as a matter of law.

The Complainant also alleges that the Respondent unlawfully engaged in acts of reprisal against her and eventually constructively discharged her from her position. In order to establish a prima facie showing of retaliation for opposition to discrimination, the Complainant must show that she engaged in statutorily protected opposition, she suffered an adverse employment action at the time of or after the protected conduct, and a causal connection exists between the two. See, e.g., *Jackson v. St. Joseph State Hospital*, 840 F.2d 1387, 1390 (8th Cir. 1988).

The Administrative Law Judge is persuaded that the Complainant has presented sufficient facts to support a prima facie case of reprisal. The Complainant's complaints to her superiors regarding the sexual comments allegedly made by Mr. Goldberg, if proven at the hearing, would support a finding that Ms. Blanks had opposed a practice prohibited by the MHRA. 5/ In her charge of discrimination, affidavits, and deposition, Ms. Blanks has alleged that she was singled out, belittled, ridiculed, and otherwise treated differently by Messrs. Goldberg and Friedell after she complained about Mr. Goldberg's conduct. Contrary to Crystal Foods' arguments, she has asserted that this differential treatment began shortly after she complained of the comments and continued until just prior to her resignation. She contends that this treatment rendered her working conditions intolerable. See, eg., Blanks Affidavit at 2, 13, 14, 15, 16. She asserts that Mr. Friedell harassed her "approximately once every couple of months" at meetings with Sales Representatives and at other meetings of management and staff. Id. at 16. As a legitimate, nondiscriminatory reason for Mr. Friedell's alleged conduct, Crystal Foods has provided evidence tending to support an inference that Mr. Friedell had a confrontational management style which was directed toward many employees, not just Ms. Blanks. In response, Ms. Blanks has offered the affidavits and testimony of other Crystal Foods employees that Mr. Friedell singled out Ms. Blanks, treated her in a disrespectful and condescending manner, and confronted her more frequently than other employees. *Chez* Affidavit at 5; *Andrews* Affidavit at 7; *Robertson* Affidavit at 9, 10; *Andrews* Deposition at 35. One employee testified during his deposition that he could

not remember any occasion on which Mr. Friedell yelled at any other employee.
Johnson Deposition at 46.

Ms. Blanks thus has shown that genuine issues of material fact remain in dispute regarding the reprisal claim, including the nature of any retaliatory conduct by the Respondent and its motives for engaging in such conduct are disputed by the parties. Disputed issues of material fact also exist regarding whether the Complainant in fact resigned in order to escape intolerable working conditions caused by illegal acts of reprisal occurring over months and years of her employment and thus was constructively discharged. Accordingly, it is not appropriate to award summary judgment with respect to the reprisal and constructive discharge claims.

5/ The Complainant need not show that the conduct she opposed was in fact discriminatory within the meaning of the MHRA but is merely required to show that that she had a "good faith, reasonable belief that the underlying challenged action violated the law." Hentz V. Maryland Casualty Co., 869 F.2d 1153 (8th Cir. 1989).

Because the Complainant has shown that specific facts are in dispute that have a bearing on the outcome of the case, the Respondent is not entitled to judgment as a matter of law. The Respondent's Motion for Summary Judgment thus has been denied.

B.L.N.