

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

State of Minnesota by
David Beaulieu, Commissioner,
Department of Human Rights,

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

Complainant,

V.

Jill's Gas & Grocery, Inc.
and Gerald M. Krebs,

Respondent,

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on October 28 and 29, 1992, at 9:00 a.m. at the Job Service and Training and Unemployment Compensation Office, 418 Third Avenue East, Alexandria, Minnesota.

Jonathan C. Lewis, Strusinski & Associates P.A., Attorneys at Law, 525 Park Street, Suite 303, St. Paul, Minnesota 55103 appeared on behalf of Jill's Gas and Grocery, Inc. (Jill's) and Gerald M. Krebs. Erica Jacobson, Special Assistant Attorney General, 1100 Bremer Tower, Seventh Place and Minnesota Street, St. Paul, Minnesota 55101 appeared on behalf of Complainant Minnesota Department of Human Rights (Department).

Posthearing briefs were filed by both Complainant and Respondents. The record closed on this matter on February 1, 1993, when the final brief was received from the parties.

Based upon the record in this matter, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. In July, 1982, Gerald Krebs started a convenience store in Alexandria, Minnesota. Jill's was incorporated as a Minnesota corporation on January 1, 1983. It now operates two stores, one store in Alexandria (Alex store) and the other in Nelson, Minnesota (Nelson store). The two stores

carry groceries, convenience items, gasoline, over-the-counter medications and deli-style fast food. The Nelson store has a laundromat and offers video movie rental, Each store normally operates with one cashier on duty at one time. The cashiers are responsible for stocking, cleaning, accepting deliveries, and operating the cash register. Each store has a manager, who does scheduling, ordering and some clerical duties in addition to cashiering.

2. Krebs obtained a Bachelor of Science Degree in Industrial Education from the University of Minnesota. He taught school in Brooklyn Center, Minnesota for seven years and in Osakis, Minnesota for one year. He then, in 1979, started G & K Custom Painting, Inc., a company that originally did outside building painting, but now operates a body shop Jr. 248-9. That business is in the process of closing down. Ex. 34, p, 9. Krebs also operates Transport Sales of Alexandria, Inc., which is a wholesale distributor of petroleum products which sells and delivers those products to the convenience stores and some other customers, Ex. 34, ps. 9-10.

3. Jill's is an S corporation for income tax purposes as are Transport Sales of Alexandria, Inc. and G & K Custom Painting, Inc, Krebs owns 50 percent of each of the companies. Krebs' uncle and uncle's wife own the other 50 percent of Jill's and G & K Custom Painting. Ex. 34, ps 5 and 10. The record does not show who owns the other 50 percent of Transport Sales of Alexandria, Inc, Tr. 252. Krebs is the only officer of Jill's and the other corporations. Krebs' primary source of income is Jill's, In 1990, he received wages of \$28,834 from Jill's and \$5,590 from G & K Painting, Inc, (The 1990 information tax return for Jill's indicates compensation of officers to be \$34,834, exactly \$6,000 more than was paid to Krebs in the form of salary, Ex. 33, Apparently, that was paid to the other owners.) In addition to his salary income in 1990, Krebs reported income from his 50 percent of the ordinary income or loss from the three corporations: \$311 income from G & K Custom Painting, Inc., a \$2,844 loss from Transport Sales of Alexandria, Inc., and \$3,547 income from Jill's. Krebs also reported net rental income of \$4,634 from a commercial property in Alexandria and a net rental loss of \$1,388 from rental of a house in Osakis, Thus, Krebs' total income in 1990 was reported as \$38,684-

4. On its tax return for 1989, Jill's reported gross sales of \$1,506,378, no compensation of officers and ordinary income of \$11,870. Ex. 34, Deposition Ex, 2, In 1990, Jill's reported gross sales of \$1,802,050, compensation of officers of \$34,834, and ordinary income of \$7,094; in 1991, it reported gross sales of \$1,856,731, compensation of officers of \$25,334, and ordinary income of \$30,292. Ex. 33. Thus, Krebs' income from Jill's was

about \$50,000 in 1991. Jill's balance sheet for December 31, 1991, showed a net equity of \$1,995 with current assets of \$75,931, consisting primarily of inventory and accounts receivable. Jill's had current liabilities of payables for gas, groceries and various taxes of \$116,972 and long term liability of \$66,324, including a note payable to Krebs of \$10,153.

5. In August, 1982, Jill's and Krebs hired Charging Party Teresa Bertram. Bertram was originally hired as a part-time cashier, but after a few months became a full-time employee. After about two years Bertram was promoted to manager of the Alex store. Bertram was receiving \$6.00 per hour in 1989. Bertram reduced her hours due to an injury suffered in an automobile accident in March of 1989. By September of 1989, Bertram was able to work about 35 hours per week.

6 In October, 1984, Charging Party Susan Halstead began working for Jill's as a cashier, Halstead briefly left employment with Jill's in 1989, but returned within two weeks. Over eight months in 1989, Halstead earned \$6,735.81, Halstead's hourly wage averaged \$4.45 and she worked approximately 36 hours per week in 1989.

7. Charging Party Nanci Miller began working for Jill's as a cashier in December, 1987. Miller worked in whichever store needed staff. In the Alex store, Miller's shift would run from 3:00 p.m. to 11:00 p.m. or midnight. Miller worked the night shift and some daytime shifts, 6:30 a.m. to 3:00 p.m., in the Nelson store, particularly when Nila Roering, the Nelson store manager, was on maternity leave. Miller received \$4.20 per hour and worked between 30 and 40 hours per week in 1989. She was paid a shift differential of 10 cents for nights and 20 cents for weekends.

8. Krebs spent most of his time working on his other businesses. But he would visit each store several times per week to check on things or to deliver gas. While at each store, he might troubleshoot equipment problems, sit, do some bookkeeping, watch customers, read a newspaper, drink coffee or talk to the cashier working that shift. His visits would typically range from 15 minutes to one hour, depending upon his activities in the store. Each cashier saw Krebs about three times a week.

9. From the fall of 1987 to the fall of 1989, Krebs made express comments on employees' anatomies or appearance, commented on attractive female customers' anatomies and frequently used demeaning terms for female body parts. The terms used by Krebs for female breasts included "headlights" and "jugs." If he noticed a woman's nipples to be erect, he would say her "headlights were on." He referred to women's buttocks as "poopers." When observing an attractive customer, and if he had the opportunity, Krebs would ask the cashier who she was, or to line him up on a date and made other comments to indicate his desire for a woman for sex. All such comments were unwelcome to the Charging Parties, but they never specifically told Krebs they found his conduct offensive, Krebs never expressly asked any of the Charging Parties to engage in sex.

10, Krebs had a generally intimidating manner in dealing with his employees and frequently let it be known that they all could be replaced and that they must "do things my way or hit the highway." When he was upset with a female employee he would sometimes yell at her until she cried and said he knew he got through to them if they cried. Jill's had over time employed a few male cashiers, but the vast majority of the cashiers and job applicants for cashier positions were female.

11. Late in 1987 or early in 1988, Jill's hired an independent contractor to clean and wax the floors of both the Alex store and Nelson store. That independent contractor, Phil Paulson, made lewd comments to the cashier on duty in the Alex store, Tina Rust-Frasel. She felt uncomfortable around the man and on two occasions, he followed her home without any invitation or encouragement. Rust-Frasel took her concerns to Bertram, her supervisor. Rust-Frasel did not talk to Krebs, because she found his sexual comments perverse and because she felt intimidated by him. Bertram passed on Rust-Frasel's concern to Krebs. Krebs immediately responded to the situation by terminating the use of Paulson's service.

12. Applications for employment were left with the cashiers on duty, Krebs instituted a policy that the employee who accepted the completed application initial the form. Krebs would ask the employee who accepted the application to describe female applicants in terms of whether the applicant was overweight, thin, attractive, unattractive and had large or small breasts. The Charging Parties were left with the reasonable impression that Krebs hired on the basis of appearance, not ability and with the idea that such employees could be potential sex partners for him,

13. Bertram observed that Krebs' offensive comments about female customers and questions about female applicants started after Krebs' second divorce in 1987. He also began making offensive comments to her at that time, On one occasion, Bertram walked out of the office in the Alex store and Krebs was walking behind her, He said, "Ooh, nice pooper," in reference to Bertram's buttocks. Bertram said, "Watch it!" Krebs responded that he had been for a long time. Krebs had also told Bertram "your headlights are on" on occasion and once informed her of his fantasy of having sex with two women

14. On two or so occasions, Krebs asked Bertram if she had had any "bed exercise" over the weekend meaning had she had any sex, On another occasion, Bertram informed Krebs that a customer had masterbated in front of Halstead, Krebs laughed and said, "Knowing Sue, she probably thinks ;he turned him on."

15. On one occasion, Krebs inquired of Bertram whether any large receipts on commercial accounts receivable had been received. Krebs phrased the question as "any big ones?" Bertram responded by pulling her blouse taut across her breasts and saying "the only big ones I got are these." Bertram occasionally told jokes to Krebs, customers or delivery men that were mildly "off-color "

16. Bertram found Krebs' comments to be offensive and they made her feel cheap and a sexual object in that perhaps she too had been hired because she was attractive and not because she could do a good job. She felt the treatment by Krebs becoming more intolerable and began looking for other work in early 1989. Because of the treatment she became emotionally distraught, did not want to go to work anymore and would cry before she left home, The stress exacerbated pain from the injuries she had incurred in the automobile accident, Bertram did not tell Krebs that she was offended by his conduct because she was always afraid she would be fired and because of his generally

intimidating manner.

17. When Miller first started at Jill's, she mentioned to Krebs that she had had an argument with her husband. Krebs responded, "If you weren't married, we could have a real good time." The comment indicated Krebs' desire to engage in sex with Miller. Within a few months of starting work, Miller was told by Krebs that he would start her early on the profit-sharing plan, but not to tell any other employees. Krebs did not explain why he intended to do this. Miller reasonably wondered what he wanted in return. She was never put on profit sharing with Jill's,

18. Krebs directed several other comments toward Miller that were sexual in nature, When she wore a blouse, he would take the opportunity to say, "Don't you look nice today," in a sexual tone of voice while staring at her

breasts. Krebs asked Miller to set him up on dates with attractive customers and told her "Come on, Nanci, you got to find me a date, what am I going to do with you." Krebs told her that he needed someone to keep his bed warm. He made comments to her about female customers and job applicants as described above.

19. On one occasion, a male customer approached Miller during her night shift at the Nelson store. He made explicitly sexual advances toward Miller and stopped only when Miller threatened to call the police. When Miller complained about the customer's conduct to Krebs he responded by laughing and telling her that she had to put up with the customers.

20. On two or three occasions while Miller was working, Krebs threw napkins or popcorn at Miller, attempting to land them down the front of her blouse, sometimes successfully. Miller asked several times for Krebs to "knock it off," and once retaliated by throwing popcorn back. On at least one occasion, Krebs' son took part in this conduct. This conduct was sexual in nature in that it invaded the privacy of Miller's body, caused her to move her body in ways that may have been titillating to Krebs and demonstrated his dominance over her.

21 While Miller was working at the Nelson store, Krebs assigned the task of organizing the videos to Miller. On a Saturday when Miller was not scheduled to work, Krebs asked her to accompany him to K-Mart to shop for videos, Krebs then told her that more videos for the store had been purchased and were at his home, He drove her to his home to look at the videos he had there. While there, Miller felt uncomfortable and stayed on the far side of the room from Krebs, Krebs looked at some of the videos and talked about how the rental system was intended to work. After a short time, both Krebs and Miller left. At no time during this conversation at his home did Krebs suggest any sexual activity or make offensive comments. However, Miller reasonably believed that Krebs had created the situation to set up the possibility of a sexual encounter.

22, In December, 1988, Miller was strongly criticized by Krebs for failing to attend the annual Christmas party. Krebs told her that she had an "attitude problem." Miller inquired as to what that problem was, but Krebs did not elaborate. He retaliated by refusing to allow Miller to work on the day of the Christmas party and told her she would no longer be in charge of videos, although that would probably have happened anyway when Roering returned from maternity leave.

23. During the summer of 1989, Krebs had his secretary/bookkeeper at G &

K Custom Painting call Miller at home and invite her to go drinking with them at the Alexandria VFW. Miller was afraid that the drinking might accelerate Krebs' sexual advances, but was also afraid that he would be upset if she turned him down because of the way he had treated her after she did not attend the Christmas party. So she went to the VFW and remained as far as she could from Krebs and felt very uncomfortable. She then left for home to feed supper to her children.

24. In the spring of 1989, Miller gave two-weeks notice to Jill's and began working for another convenience store while she continued working at Jill's. She was not happy with the training she was getting after one day at the new store and decided to stay with Jill's, which she was allowed to do.

25. Krebs' conduct and comments made Miller feel degraded as a woman, fearful of the motives behind his conduct and afraid to go to work with the thought that Krebs might be there, wondering what he would do that day.

26. Krebs directed several comments of a sexual nature to Halstead, including the comments about customers, his desire for dates and questions about female applicants described above. On one occasion, Krebs told Halstead her headlights were on. On other occasions Krebs told Halstead that Bertram "had nice buns" or that he liked the way Bertram's jeans fit. Krebs also told Halstead that he had to go home to an empty house and a cold bed. He occasionally told her, "Smile if you got any over the weekend."

27. On one occasion, Halstead was at the counter waiting on a customer when Krebs came in and put her paycheck down the back of her shirt. Halstead did not know what to think of this conduct and felt embarrassed. Again, this was sexual conduct by Krebs in that it invaded the privacy of Halstead's body and was probably titillating for Krebs,

28. Jill's does not carry sexually explicit magazines or videos at either store. However, at one point Krebs brought in some novelty items, including a plastic banana containing a replica of a penis, a plastic cucumber containing a replica of a penis, and a pop can cover shaped like a penis and scrotum. These items were not put on display, but kept in a bag behind the counter with instructions from Krebs to sell to people who asked for such items or who the cashiers thought might be interested. Krebs used one of these novelty items while crudely joking with Roering. He asked her whether she needed the item or whether her husband kept her sexually satisfied. Halstead refused to sell the items.

29. On another occasion, Krebs held a meeting with Bertram, Halstead, and Miller to discuss declining customer count. Krebs sought to increase customer count at the Alex store and related a story that he had heard about women wearing bikinis and pumping gasoline for a convenience store in California and suggested that perhaps they do something similar. Krebs didn't mean the comment literally, but was implying that they might attract more customers by dressing more sexy and, again, that they were sex objects to be used by him.

30. Krebs' treatment of Halstead made her felt degraded, very self-conscious, very apprehensive and upset and caused her severe headaches from the tension and stress as well as weight loss and insomnia which turned her into a "total wreck, just physically unable to cope anymore."

31. In August, 1989, Bertram, Halstead, and Miller talked among themselves about the situation and discovered for the first time that they were all experiencing the same behavior from Krebs and that the situation had become intolerable for all of them. They decided to find out what the law was regarding the situation. On September 7, 1989, they spoke to the manager of the Alexandria office of the Minnesota Department of Jobs and Training about what was happening. He told them that it was probably illegal sexual harassment and put them in contact with the Department of Human Rights. He told them that if they quit their jobs, they might still be eligible for

unemployment. The Department of Human Rights told them how to file claims
and

told them not to tell anyone else about the accusations. The three decided to quit. On September 7, 1989, Bertram, Halstead, and Miller left their keys in the safe of the Alex store and informed Krebs' secretary that they were no longer working for Jill's. Their abrupt departure caused significant disruption in the operation of the Alex store.

32. Bertram, Halstead, and Miller filed applications for unemployment compensation on September 8, 1989. The applications were denied on the grounds that the employees had voluntarily left employment and had not made their employer aware of the offensive situation and thus had not exhausted all alternatives to have the situation corrected. All three employees appealed, but because of scheduling problems failed to appear at the appeal hearing. The initial denials were affirmed on appeal and no further appeal was taken,

33. In January, 1990, Krebs initiated lawsuits against Bertram, Halstead, and Miller by serving a Summons and Complaint on each of them. The Complaints were substantially identical and referred to Krebs as "Plaintiff dba Jill's Gas and Grocery, Inc." They alleged that the unemployment claims filed with the Minnesota Department of Jobs and Training were made in bad faith, misrepresented the situation at Jill's and that the allegations of sexual harassment in the unemployment claims defamed Krebs. Each lawsuit asked for damages in excess of \$50,000. A stipulation for dismissal of the lawsuit against Halstead was executed on August 27, 1990. The other two lawsuits are extant, but dormant, insofar as no action has been taken by Krebs to advance or dismiss them. (Respondents allege in their brief that the lawsuit against Miller has been dismissed, but there is no evidence in the record of that.)

34. Bertram has incurred \$1,998.58 in attorney's fees and costs through September 30, 1990, defending Krebs' lawsuit. Neither Halstead nor Miller incurred any attorney's fees or costs defending Krebs' lawsuits. Halstead's homeowner's insurer defended the action against her and obtained the voluntary dismissal after serving an answer and some discovery.

35. After Bertram resigned, she actively sought full-time employment with little success. She worked briefly for the U.S. Census Bureau and earned \$593.80. She finally obtained permanent employment on February 18, 1991, but her wage was \$5.00 an hour until August of 1991.

36. Halstead remained unemployed for eleven weeks until she went to work for Viking Foods on November 29, 1989. She started there at \$4.40 per hour and had an increase to \$4.65 per hour in August 1990, and has had regular

raises since that time, The work is less than full time, but she is satisfied with that,

37. Miller was unemployed for five weeks until she obtained a job at the Holiday Gas Station earning more than she had been earning at Jill's.

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

CONCLUSIONS

1. The Administrative Law Judge has jurisdiction in this matter pursuant to Minn. Stat, 363.071 and Minn. Stat, 14.50.

2- Jill's is an employer as defined in Minn. Stat. 363.01, subd. 17, and Bertram, Miller and Halstead are employees as defined in Minn. Stat. 363.01, subd. 16.

3. Minn. Stat. 363.03, subd. 1(2)(c) makes discrimination against an employee by an employer on the basis of sex (gender) an unfair employment practice. Sexual harassment is discrimination for the purposes of determining sex-based discrimination Minn. Stat. 363.01, subd. 14

4. In relevant part, Minn. Stat. 363.01, subd, 41, defines "sexual harassment" to include:

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 in the case of employment, the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action,

5. Krebs' conduct and communication toward Charging Parties was unwelcome and of a sexual nature and had the purpose or effect of substantially interfering with Charging Party's employment at Jill's and such conduct and communication created an intimidating, hostile, or offensive employment environment for each of the Charging Parties. A majority of Krebs' comments were explicitly sexual in nature. These comments included referring to women's breasts and buttocks and the state of erection of their nipples, comments about his need for dates and someone to warm his bed and questions about the Charging Parties' sexual activities over the weekend, Much of the rest of his conduct and comments contained sexual overtones or innuendo such as complimenting Miller on her appearance while staring at her breasts, throwing napkins and popcorn down Miller's blouse and stuffing checks down Halstead's back, inviting Miller out for a drink and to his home or promising special favors for no other apparent reason. Some of his actions were purely

acts of intimidation based in part upon his position as boss and in part upon his perception of women's weaknesses. Krebs' conduct and comments were unwelcome by the Charging Parties. They did nothing to invite Krebs' harassment. Bertram seemed to participate in some humor and joking at the store, but it was merely social and in no way showed that she welcomed Krebs' behavior. Even though Charging Parties did not specifically protest to Krebs

regarding his offensive conduct, that was not unreasonable in the intimidating

atmosphere he created among his employees. Moreover, there is no requirement that Charging Parties must inform Krebs that his behavior was offensive and constituted sexual harassment. *Kay v. Peter Motor Co., Inc.*, 483 N.W.2d 481 (Minn. App. 1992), Krebs' conduct was not as egregious as appears in some sexual harassment cases because it did not involve any grabbing, use of vulgarities or explicit and repeated requests for sexual favors.

Nonetheless,

the totality of the situation created by Krebs' conduct and communications created an intimidating, hostile and offensive employment environment for the Charging Parties as it would for any reasonable woman and that fact would be recognized by any reasonable man. Krebs' conduct toward Charging Parties is the type of conduct that has been recognized as sexual harassment in Minnesota

since at least 1980 when the standards were set in *Continental Can, Inc. v. State*, 297 N.W.2d 241 (Minn, 1980). Finally, because Krebs is an owner and the only officer of Jill's, Jill's knew of the existence of the harassment. There was no need for Charging Parties to inform Jill's. Therefore, Jill's has discriminated against the Charging Parties on the basis of sex in violation of Minn. Stat. 363.03, subd. 1(2)(c). Krebs aided and abetted that discrimination and has therefore engaged in an unfair discriminatory practice under Minn. Stat. 363.03, subd. 6.

6. The Charging Parties' resignations were constructive discharges, For each of the Charging Parties, the working conditions created by Krebs' behavior became more and more intolerable. In August 1989, they first talked to each other about their individual situations and realized they were not alone in their individual feelings about their situations. On September 7, 1989, they sought advice about the legality of their situations from a reasonable source, the local State Department of Jobs and Training office. They learned then that the situation constituted sexual harassment and that they did not have to tolerate it and that quitting would be a legitimate response. Thus, they resigned because of the sexual harassment and to escape the intolerable working conditions caused by it,

7 Minn, Stat. 363,03, subd, 7 states:

It is an unfair discriminatory practice for any employer
..- to intentionally engage in any reprisal against any
person because that person:

(1) opposed any practice forbidden under this chapter or
has filed a charge, participated in any manner in an
investigation, proceeding, or hearing under this chapter

8. Jill's and Krebs intentionally engaged in reprisals against the Charging Parties by initiating lawsuits against them after the employees complained of sexual harassment in claims for unemployment compensation and filed charges with the Department of Human Rights alleging sexual harassment.

Krebs is the only officer of Jill's, and therefore his actions may be imputed to Jill's. Moreover, while the captions of the Complaints indicated only Krebs as Plaintiff, the body of the Complaints made it clear that the actions were also brought on behalf of his business, Jill's, seeking damages for injuries caused to the business as well as to Krebs' personal reputation.

Krebs may also be considered an employer in this case because Jill's was

operated and taxed as his alter-ego, like a partnership. Krebs is also liable if he aided and abetted Jill's in a reprisal, which he did.

The three-step analysis established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) applies to reprisal cases under the Minnesota Human Rights Act. Hubbard v. United Press International, Inc., 330 N.W.2d 428 (Minn. 1983). A prima facie case is established by showing statutorily protected conduct by the charging parties, adverse action by respondent and a causal connection between the two. Hubbard, 330 N.W.2d at 444.

Charging Parties here engaged in conduct protected by the Act. They brought their problems to the Minnesota Department of Jobs and Training to obtain information about the legality of the situation. The manager of the Alexandria office listened to their statements regarding Krebs' conduct, gave them his interpretation and put them in contact over a speaker phone with the Department of Human Rights in St. Paul. Contacting the local office of the Department of Jobs and Training was clearly an appropriate method of opposing Krebs' sexual harassment for several reasons. First, according to the State of Minnesota 1992 Telephone Directory, it is the only state office that even remotely relates to employment practices. Second, the unemployment law contains specific provisions regarding sexual harassment. Minn. Stat. 268.09, subd. 1; Heaser v. Lerch, Bates & Associates, 467 N.W.2d 833 (Minn. App. 1991). Third, the manager of the office demonstrated that it was the appropriate agency to contact by putting the Charging Parties immediately in contact with the Department of Human Rights. Even if Charging Parties had contacted an inappropriate agency with their complaints, their actions would have been protected. Hicks v. Abt Associates, Inc., 572 F.2d 960 (3d Cir. 1978). In filing for unemployment and alleging sexual harassment, the Charging Parties were quite appropriately attempting to qualify for benefits under the provisions of Minn. Stat. 268.09, subd. 1, and were thereby opposing the sexual harassment of which they were victims. In talking by telephone with the Department of Human Rights on September 7, 1989, in filling out questionnaires for the Department of Human Rights and in filing formal charges of discrimination, the Charging Parties were filing charges and participating in an investigation and proceeding under the Act.

Krebs and Jill's took adverse action against Charging Parties by filing the lawsuits against them, Krebs was aware by that time of the unemployment

claims and the charges of discrimination that had been filed at that time by Bertram and Halstead. Filing a lawsuit against someone with a claim for damages in excess of \$50,000 is clearly an adverse action. The primary reason that Krebs filed the lawsuits against Charging Parties was because they had accused him of sexually harassing them in their unemployment claims. He also was upset that they had all quit at the same time causing him and the remaining employees at Jill's significant inconvenience. Thus, there is a causal connection between the Charging Parties' actions in opposing his sexual harassment and the lawsuits he filed. Lawsuits have been held to be a form of retaliation prohibited by anti-discrimination statutes. EEOC v. Virginia Carolina Veneer Corp., 495 F. Supp, 775 (W.D. Va. 1980); State by Cooper v. Gehling Auction Company, Inc., Minnesota Office of Administrative Hearings Docket No. 8-1700-3294-2 (Order dated August 11, 1989). However, as explained in Gehling Auction, there is not an absolute ban on employers bringing suit in response to a discrimination allegation. Such suits may be allowed where they allege an independent basis for the action or where the original allegations

by the employees were made maliciously. *Greene v. Armco, Inc.*, 696 F. Supp, 1328 (C.D. Cal, 1988); *Bill Johnson's Restaurants, Inc. v. NLRB*, 103 S. Ct, 2161 (1983). As explained by the Supreme Court in *Bill Johnson's Restaurants*, the right to litigate is an important one and the evidence must be considered with upmost care before ordering cessation of a state-court lawsuit. However, an Administrative Law Judge may enjoin an action that is improperly motivated, lacks a reasonable basis and, in this case, violates the Human Rights Act. 103 S, Ct. at 2170. The Supreme Court stated that if the plaintiff in the court action is able to present evidence that shows the lawsuit raises genuine issue of material fact, the lawsuit cannot be enjoined in the administrative proceeding. *Bill Johnson's Restaurants*, 103 S. Ct. at 2171. The Administrative Law Judge cannot try the district court lawsuit, but must, In essence, make a determination as to whether the plaintiff in the lawsuit could resist a Motion for Summary Judgment.

The first cause of action in each of the Complaints was that the Charging Parties' claims for unemployment alleging sexual harassment by Krebs were made with intentional misrepresentation and in bad faith. Krebs has presented no evidence whatsoever in this matter that there was any intentional misrepresentation or bad faith by the Charging Parties in filing their unemployment claims. The factual allegations regarding Krebs' conduct and comments made in the unemployment claims were, for the most part, the same allegations made in this proceeding and which, for the most part, Krebs has admitted occurred, His argument is that he did not know and was not told that Charging Parties considered it sexual harassment. That does not make the Charging Parties' actions malicious. Moreover, the Charging Parties had been advised by the manager of the local Jobs and Training office that the facts did constitute sexual harassment. Krebs has no evidence to show that there was any intentional misrepresentation or bad faith in this case and certainly no malicious abuse of an anti-discrimination statute of the type that occurred in *Greene v. Armco, Inc.*, 696 F. Supp. 1328 (S.D. Cal. 1988).

The second cause of action stated in the Complaints against Charging Parties is a defamation action based on allegations that each of the Charging Parties defamed Krebs by accusing him of sexual harassment in their claims to the Department of Jobs and Training and by their "publication of her claims of sexual harassment to members of the community in Douglas County." As already noted, the claims made to the Department of Jobs and Training are not actionable, Krebs presented no evidence whatsoever that any of the Charging

Parties made allegations that he sexually harassed them to any members of the public. Each of the Charging Parties testified that they only informed the manager of the Department of Jobs and Training, their spouses, and the Department of Human Rights, which instructed each of them not to make any public allegations regarding the matter. Krebs' only evidence is that he heard from various sources that the women had left because of sexual harassment. But that is not sufficient evidence to defeat a Motion for Summary Judgment. It is most likely that members of the community were well aware of the manner in which Krebs spoke about and to women and quite easily figured out what had happened. Thus, Krebs has presented no evidence that would show there is a reasonable basis for his lawsuits. Therefore, they constitute retaliation against Charging Parties by Krebs and Jill's in violation of Minn. Stat. 363.03, subd. 7.

9. Minn. Stat. 363.071, subd. 2, requires the Administrative Law Judge, upon determining the existence of a discriminatory practice, to order the Respondent to cease and desist from the practice. Therefore, it is appropriate to issue an order requiring Jill's to cease and desist from allowing sexual harassment to exist in its work place and to enjoin the remaining lawsuits against the Charging Parties. It is also appropriate to require Jill's to adopt and post an appropriate sexual harassment policy and make it known among its employees. The policy must contain a provision allowing for employees to report sexual harassment to someone other than Krebs if they desire. The Complainant has also requested that Jill's should provide sexual harassment training, at least for Krebs. That is not required because if Krebs does not now understand what sexual harassment is, he never will,

10. The Charging Parties are entitled to compensatory damages for lost pay due to their constructive discharges. Bertram is entitled to be compensated for the time she remained unemployed from September 7, 1989 to February 18, 1991, at the rate of \$6.00 per hour for thirty-five hours per week which is the approximate level she was able to work because of her injury. Deductions should be made for \$594 that she earned while working briefly during that period. She is also entitled to compensation from February 18, 1991, when she obtained employment and was paid \$5.00 per hour until August 1991, when she obtained a pay raise to at least \$6.00 per hour. This should be calculated at forty hours per week because she was able to work full time at least by that point in time. She is entitled to simple interest at the rate of 6 percent on these amounts. Halstead is entitled to compensation at the rate she was paid at Jill's for the eleven weeks she remained unemployed plus interest. That amount is approximately \$2,090. She now works at a job that is less than full time, but finds that satisfactory. She did for awhile work at an hourly rate that was less than she was paid at Jill's and is entitled to some compensation for the difference. An amount of \$150 is appropriate for that purpose. Miller is entitled to compensation at the rate of \$4.20 per hour for thirty-five hours per week plus an amount for night and weekend differentials for the five weeks she remained unemployed for a total amount of approximately \$750 plus interest.

11. The Charging Parties are entitled to damages for mental anguish, Each suffered stress, fear and personal humiliation. Miller suffered particularly from the additional attention Krebs seemed to direct to her Awards of \$8,000 each to Bertram and Halstead and \$10,000 to Miller are appropriate under the circumstances in this case.

12. The Charging Parties are entitled to punitive damages as a result of the sexual harassment, Krebs' conduct showed a willful indifference to their right to be free from sexual harassment in the work place. The tax returns show that Jill's generates an income for Krebs that is substantial, most recently \$50,000 in 1991, but Jill's is clearly not a large and highly profitable corporation with significant assets. Punitive damages for each of the Charging Parties in the amount of \$5,000 is appropriate.

13. A civil penalty under Minn. Stat. 363.071, subd. 2, is also required. Considering the factors set forth in the statute of the seriousness and extent of the violation, the public harm occasioned by the violation, whether the violation was intentional and the financial resources of Respondent, a civil penalty of \$10,000 is appropriate in regard to the illegal sexual harassment,

14. Bertram is entitled to compensatory damages for the attorney's fees she incurred in defending against the lawsuit by Krebs in the amount of \$1,998.58,

15. Each of the Charging Parties is entitled to damages for mental anguish suffered as a result of the reprisal lawsuits. Each was shocked by the receipt of the Summons and Complaint, and terrified by the prospect of paying an award in excess of \$50,000, which none of them have, and of attempting to defend against the lawsuit. However, Bertram obtained a lawyer to represent her, as did Halstead through her homeowner's insurer, All of them were aware fairly soon that Krebs was not likely to prevail in his lawsuits. An award of \$2,000 each for mental anguish in this regard is appropriate.

16. Charging Parties are also entitled to punitive damages with regard to the reprisal lawsuits. The suits were brought primarily because the Charging Parties filed unemployment claims alleging sexual harassment against Krebs. This showed a willful indifference by Krebs to their rights because they had every right to file for unemployment and to allege the sexual harassment they had endured and which Krebs knew had occurred. On the other hand, Krebs had the advice of counsel in bringing lawsuits and an incorrect decision by the Department of Jobs and Training that his actions did not constitute sexual harassment on the part of Jill's because the Charging Parties had never complained to Jill's or attempted to alleviate the sexual harassment by alternative means. Under these circumstances, punitive damages of \$2,000 for each of the Charging Parties is appropriate.

17. Again, a civil penalty with regard to the illegal reprisal is required by Minn. Stat. 363.071, subd. 2. Considering all of the factors set forth in this statute and as discussed in the previous Conclusion, a civil penalty in the amount of \$4,000 is appropriate.

Pursuant to the foregoing Conclusions of Law, the Administrative Law Judge makes the following:

ORDER

1, Jill's and Krebs shall cease and desist from the unfair discriminatory practice of sexually harassing employees and allowing sexual harassment of employees to continue,

2. Jill's shall adopt an appropriate sexual harassment policy, which policy shall include a mechanism for employees to report suspected sexual harassment to an appropriate person other than Krebs. That person shall be a person outside the employ of Jill's and shall be authorized to report

employees' concerns to Krebs without revealing the identity of the complaining employee. All employees shall be informed of the policy and the policy shall be posted in each store in a place easily and regularly observable by employees.

3. Krebs and Jill's shall cease and desist from the unfair discriminatory practice of continuing reprisals against Bertram, Halstead and Miller.

4. Krebs shall dismiss his lawsuits against Bertram and Miller and provide appropriate documentation of the dismissals to Bertram and Miller and to Complainant

5. Jill's and Krebs shall pay total damages to Teresa Bertram in the amount of \$36,977 calculated as follows:

Lost Wages plus Interest	\$17,978
Mental Anguish for Sexual Harassment	8,000
Punitive Damages for Sexual Harassment	5,000
Attorney's Fees for Reprisal	1,999
Mental Anguish for Reprisal	2,000
Punitive Damages for Reprisal	2,000
Total	\$36,977

6. Jill's and Krebs shall pay total damages to Susan Halstead in the amount of \$19,566 calculated as follows:

Lost Wages plus Interest	\$ 2,566
Mental Anguish for Sexual Harassment	8,000
Punitive Damages for Sexual Harassment	5,000
Mental Anguish for Reprisal	2,000
Punitive Damages for Reprisal	2,000
Total	\$19,566

7. Jill's and Krebs shall pay total damages to Nanci Miller in the amount of \$19,899 calculated as follows:

Lost Wages plus Interest	\$ 899
Mental Anguish for Sexual Harassment	10,000
Punitive Damages for Sexual Harassment	5,000
Mental Anguish for Reprisal	2,000
Punitive Damages for Reprisal	2,000
Total	\$19,899

8. Jill's and Krebs shall pay civil penalties in the total amount of \$14,000 to the Commissioner of Human Rights made payable to State Treasurer, General Fund.

Dated: March 5th 1993,

STEVE M. MIHALCHICK
Administrative Law

Judge
Reported: Jacquelyn Werth Stockman
Janet R. Shaddix & Associates

NOTICE

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

