69-1700-7344-2

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,
Complainant,

V.

United Glass, Inc., a Minnesota
Corporation, Michael Drake, and
David Radcliffe,
Respondent.

ORDER ON MOTION FOR
SUMMARY DISPOSITION

The above-entitled matter is before the undersigned Administrative Law Judge on the motion of the Respondents for summary disposition.

Curtis D. Brown, Nichols, Kaster & Anderson, Attorneys at Law, 4644 IDS Center, 80 South Eighth Street, Minneapolis, Minnesota 55402-2242 appeared on behalf of United Glass, Inc., Michael Drake, and David Radcliffe, the Respondents in this matter. Sarah C. Lewis, Certified Student Attorney, and Carl Warren, Attorney at Law, Civil Practice Clinic, 190 Law Center, 229 Nineteenth Avenue South, Minneapolis, Minnesota 55455 appeared on behalf of the Department of Human Rights (hereinafter "the Department" or "DHR"). The record closed on this motion on November 1, 1993, upon receipt of the Department's Memorandum in Opposition to Respondent's Motion. The Department filed a motion for attorney's fees and costs in response to Respondent's Motion. Both Motions will be resolved in this Order.

Based on the record herein, the Administrative Law Judge makes the following:

ORDER

1. The Respondent's motion for summary disposition is DENIED.

2. The Department's motion for attorney's fees and costs is DENIED.

Dated: December 6 , 1993.

STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

The Charging Party in this matter, Barbara J. Semmler (Semmler), was employed as a receptionist by United Glass from November, 1987, to September 14, 1990. Semmler's position was eliminated by United Glass. In her charge Semmler indicates she was subject to a hostile work environment based on sex. United Glass asserts that no such hostile work environment existed and that Respondent is entitled to summary disposition of this matter.

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 , 3 5 3 (Minn . 1 9 5 5)Louwagie v. Witco Chemical Corp. 378 N.W.2d 63, 66 (Minn.App. 1985); Minn.R.Civ.P. 56.03 (1984). Summary disposition is the administrative equivalent to summary judgment and the same standards apply. Minn. Rule 1400.5500(K).

In a motion for summary disposition, the initial burden is on the moving party to show facts that establish a prima facie case that no material issues of fact remain for hearing. Theile v. Stich, 425 N.W.2d 580, 583 (Minn. 1988). Once the moving party has established a prima facie case, the burden shifts to the non-moving party. Minnesota Mutual Fire_and Casualty Company y. Retrum, 456 N.W.2d 719, 723 (Minn App. 1990). To successfully resist a motion for summary disposition, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case. Hunt v., IBM Mid-AmericA Employees Federal, 384 N.W.2d 853, 855 (Minn. 1986). General averments are not enough to meet the non-moving party's burden under Minn.R.Civ.P. 56.05. Id.; Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn.App. 1988). However, the evidence introduced to defeat a summary judgment motion need not be admissible trial evidence. Carlisle, 437 N.W.2d at 715 (citing Celotex Corp._y, Catrett, 477 U.S. 317, 324 (1986)).

The nonmoving party is entitled to the most favorable view of the evidence. Foley v. Allard, 427 N.W.2d 647, 649 (Minn. 1988). The factual discussion in this Memorandum applies that standard to the evidence submitted in support of each parties' position. Following the hearing on this matter, findings of fact will be made based on the evidence presented and the credibility of the witnesses.

Semmler alleged specific language and conduct was present at the workplace which amounted to a sexually hostile work environment. The language and conduct alleged is:

1. Referring to customers and the two female employees as "cunt" or "bitch." Semmler Tr. at 73.

2. Asking Semmler and the other female coworker if they liked kinky sex or being tied up with ropes. Semmler Tr. at 74. One of these comments was made with a male supervisor's arm around Semmler.

3. Informing a female coworker that she could have the rest of the day off if she let a male supervisor "stick my hand down your pants Semmler Tr. at 76.

4. Informing Semmler that the customer on the telephone with a male supervisior sounded "like she's lusting for my body, and if I get lucky, maybe I'll get more than just a check." Semmler Tr. at 76.

5. Referring to the two female employees as "sweet buns." Semmler Tr. at 83.

6. Informing Semmler (when she asked for a dollar to purchase soda pop for a male supervisor) that "I've got your buck hanging" while grabbing his crotch. Semmler Tr. at 104.

7. Stating that Semmler's coworker got her job by having "big tits." Semmler Tr. at 105.

8. Reaching over the shoulders of Semmler's coworker to lift the neck of her blouse, peering down at her chest, and stating "Oh, I'm just checking to see if you have a bra on because your tits have been bouncing around all day." Semmler Tr. at 75-6.

9. Leaving the bathroom door ajar when using the toilet facilities, despite the close proximity of the two female employees workstations. Semmler Tr. at 150-54.

10. Informing the two female coworkers that "all women want is a big dick and a thick wallet." Semmler Tr. at 110. This comment was made after the male supervisor had placed his arm around Semmler. Semmler Tr. at 75.

11. Asking Semmler if her mood was due to being "on the rag" [menstruating]. Semmler Tr. at 78.

The male supervisor identified as engaging in most of the foregoing conduct is David Radcliffe. Radcliffe is a forty percent owner of United Glass and primarily oversees the warehouse operation of the business. One of the incidents involved Michael Drake, President and forty percent owner of United Glass. Michael Drake was the direct supervisor of Semmler. A number of the incidents are corroborated by the first hand recollection of other persons.

These comments and actions made Semmler uncomfortable. She was humiliated by some of these comments and actions. Other incidents and practices caused Semmler to believe that female employees were treated differently. Semmler's coworker, to whom some of the explicitly sexual banter or physical contact was directed, frequently wore shorts to the office. Semmler believed that the shorts were inappropriate in an office setting and occasionally received comments from customers supporting that belief. Semmler saw this coworker giving Drake a massage. This coworker said she got a raise when Semmler had

been told that there was no money for raises that year.

United Glass maintains that Semmler's position was eliminated in August, 1990 to restructure the office operation by adding a second computer. At the time the position was eliminated, the office used only one computer operated by the other female coworker. The position held by Semmler was filled by a temporary employee until a formal hiring was held a year later. The advertisement for the opening referred to a receptionist position and did not

mention computer skills. The employee hired began work on August 1, 1991. The computer consultant for United Glass was not consulted about a second computer until late 1992. A second computer was not added until January, 1993.

Drake asserted that other reasons existed for terminating Semmler. He cited her smoking, the quality of her filing and telephone work, and her general attitude in the office. None of these reasons was communicated to Semmler while she was employed by United Glass. None of these reasons is supported by documentation, either in employee evaluations or the notice to Semmler eliminating her position.

Semmler enjoyed the work at United Glass and was upset when she was terminated. While the atmosphere at United Glass made her uncomfortable, she did not expressly complain to Drake or Radcliffe. Semmler did convey her displeasure at the language and conduct present in the workplace by refusing to engage in the banter, turning away from any conversation involving vulgar or sexual topics, and confronting Radcliffe on the use of the word "cunt" when
directed at her.

Minn. Stat. 363 (the Minnesota Human Rights Act or "MHRA") defines "sexual harassment" as conduct which:

> includes unwelcome sexual advances, request for sexual favors sexually motivated physical contact, or other verbal or physical conduct or communication of a sexual nature when:
>
> (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 ....

Minn. Stat. 363.01, subd. 41.

The MHRA prohibits discrimination in employment based on sex. Minn. Stat. 363.03, subd. 2. Sexual harassment is discrimination in employment based on sex. ContinentAl Can Co. Inc. v. State , 297 N.W.2d 241 (Minn. 1980).

The items listed above in this Memorandum, if proved, constitute "physical conduct or communication of a sexual nature." The evidence submitted indicates that the elimination of Semmler's position could have been movitated
by her failure to acquiese to the harassing conduct. Further, denial of a raise to Semmler when Semmler's female coworker received a raise could indicate acceptance of sexual harassment was a factor affecting employment decisions .

A separate ground for finding a violation of the MHRA is the prohibition against reprisal. Under Minn. Stat. 363.03, subd. 7, for any employer to
terminate an employee for opposing a practice prohibited by the MHRA is reprisal. The opposition to prohibited practices need not extend to filing a charge. See Love v. Re/MAX of America Inc., 738 F.2d 383 (10th Cir. 1984)(applying Title VII, 42 U.S.C. 2000e-3(a)); Berg v. La Crosse Cooler Co., 612 F.2d 1041 (7th Cir. 1980). The elimination of Semmler's position could constitute prohibited reprisal under the MHRA.

Where direct evidence of discrimination through disparate treatment is lacking, the three part test set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) must be used to assess whether the MHRA has been violated. Sigurdson v. Isanti County, 386 N. W.2d 792 (Minn . 1 986) ; Bersie v. Zycad Corp., 417 N.W.2d 288, 290 (Minn.App. 1988). The McDonnell Douglas test consists of:

1) The employee demonstrating a prim, facie case of discrimination by the employer.

2) The employer having the opportunity to show a legitimate nondiscriminatory reason for the action complained of by the employee.

3) The employee showing that the proffered reason for the employer's action is pretextual.

McDonnell Douglas, 411 U.S. at 802-4.

United Glass maintains that the atmosphere in the workplace, while vulgar, did not rise to the level of sexual harassment. Respondent relies upon the holding in Klink v, Ramsey County by Zacharias, 397 N.W.2d 894 (Minn.App. 1986)(rev. denied February 13, 1987). In Klink, profanity was used, but not directed at the complaining employee. Lewdness, through the prescence of suggestive or pornographic pictures, was present in the workplace, but not offered to the complaining employee. The only evidence of lewd material Klink was required to handle was a memo pad in the outline of a female form, without any anatomical details filled in. The employer responded promptly to Klink's complaints to modify the atmosphere in the workplace.

In this matter, the harassment was directed at individuals, it was specific, and it was explicit. See Kay,y, Peter MotoR Co., 483 N.W.2d 481 (Minn.App. 1992); Minn._Department of Human Right; v, Jill's Gas and Grocery, OAH Docket No. 69-1700-6854-2 (Order issued March 5, 1993). Female employees were allegedly treated differently, more favorably if the harassment was acquieced to, and less favorably if the harassment was opposed. If proved, this is a prima facie case of discrimination. United Glass states that its reasons for terminating Semmler are reorganization to expand the computerization of the office and responding to qualify concerns over Semmler's work. These are legitimate nondiscriminatory reasons for eliminating Semmler's position. However, Semmler has produced evidence that suggests the employer's reasons are pretextual. The computerization of the office was delayed for over two years from the termination. The qualifications advertised for in hiring Semmler's replacement did not mention computer skills. No documentation exists to support employer dissatisfaction with Semmler's job performance. Credibility of the witnesses will be crucial to the determination of whether the employers proffered reasons for the elimination of Semmler's position are pretextual.

A motion for summary judgment must be denied if genuine issues of material fact exist. The extent of the language and conduct complained of, whether

Semmler was terminated due to opposition of that language and conduct, and whether legitimate nondiscriminatory reasons motivated Semmler's termination are all genuine issues of material fact which render summary judgment inappropriate.

Another defense asserted by United Glass is that Semmler's supervisor, Drake, was not notified of any harassment. This lack of notice is asserted to preclude any finding of a violation of the MHRA. This defense is inappropriate since Drake was involved in one of the incidents listed above. If the supervisor is actually engaged in the violative conduct, notice of harassment is not required. Kay-v. Peter Motor Co., 483 N.W.2d at 484. While Radcliffe was not Semmler's direct supervisor, he was a forty percent owner of the business and it is therefore appropriate to impute notice to the business because Radcliffe was well aware of his own actions. Under the facts of this case such imputed notice is particularly apt, since all of the persons involved in the workplace were within earshot of each other. Drake was well aware of Radcliffe's manner of speaking to female employees and about other women. They have been partners for many years.

The Department moved for attorney's fees and costs, asserting that Respondents' motion was frivolous and intended to delay the proceedings. The record on which this Order is based does demonstrate that summary judgment is completely inappropriate, for either party. Therefore, Respondents' summary judgment motion is DENIED. However, the motion has not delayed the final hearing on this matter and has served to inform the parties of the relevant issues in this matter. The Department has not demonstrated that United Glass has acted with intent to cause a waste of time or effort. The Department's motion for attorney's fees and costs is therefore DENIED.

S.M.M.