

OAH Docket No. 9-1700-8908-2
DHR Case No. ER19931937

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Nancy Hottinger,

Complainant,

vs.

Goldberg Bonding Company,

Respondent.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The above-entitled matter came on for hearing before Administrative Law Judge Phyllis A. Reha, on September 12, 13, and 14, 1994, at the Office of Administrative Hearings in Minneapolis, Minnesota.

Donald E. Horton, Esq. and Leslie E. Scott, Esq., Horton & Associates, Title Insurance Building, 400 Second Ave. S., Minneapolis, MN 55401-2402, appeared on behalf of the Complainant, Nancy Hottinger. Joseph Sokolowski, Parsinin, Bowman, & Levy, 100 South 5th St., Suite 100, Minneapolis, MN 554 appeared on behalf of Respondent, Goldberg Bonding Company.

Posthearing briefs were filed by both Complainant and Respondent. The record closed in this matter on November 1, 1994, when the final brief was received from the parties.

MOTION TO DISMISS

On October 28, 1993, Nancy Hottinger filed a charge with the Minnesota Department of Human Rights alleging three claims:

- 1) Sex Discrimination in violation of Minn. Stat. § 363.03, subd. 1(2)(c);
- 2) Sexual Harassment in violation of Minn. Stat. § 363.03, subd. 1(2)(b); and
- 3) Reprisal Discrimination in violation of Minn. Stat. § 363.03, subd. 7(1).

This action was subsequently removed to the Office of Administrative Hearings pursuant to Minn. Stat. § 363.071, subd. 1(a).

At the conclusion of the Complainant's case, Respondent moved to dismiss three of the above-listed charges as a matter of law, claiming that Complainant had failed to establish a prima facie case for any of the charges. Oral Argument was heard on the Motion. The Administrative Law Judge GRANTED the Motion in part, dismissing the sex discrimination and sexual harassment claim, but DENIED the Motion in part, with respect to the Reprisal Discrimination claim.

STATEMENT OF ISSUES

The issues remaining in this case are as follows:

1. Did Goldberg Bonding Company discriminate against the Complainant Nancy Hottinger by retaliating against her after she complained about what she believed was sex discrimination and/or sexual harassment in employment in violation of Minn. Stat. § 363.03, subd. 7(1); and

2. Is Complainant entitled to compensatory damages, damages for mental anguish and suffering, punitive damages, and attorney's fees and costs and, so, in what amounts; and

3. Should a civil penalty be assessed against the Respondent?

Based upon the evidence adduced at the hearing, together with the briefs and arguments of counsel, and upon all the files, records, and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Respondent, Goldberg Bonding Company (GBC) is in the business of issuing bail bonds, with offices in Minneapolis and St. Paul.

2. Complainant, Nancy Hottinger is a female. GBC hired Hottinger in February, 1992, and she worked in the St. Paul Office of GBC. Her job duties involved the selling of criminal bail bonds. She was a licensed bonding agent and worked as a full-time salaried employee of GBC.

3. When Hottinger was interviewed for her position, GBC President, Paul Goldberg told Hottinger that in addition to her daytime hours, she would be scheduled one night a week and one weekend a month on the "night calendar." The night calendar was a series of weekend and evening shifts which a bonding agent could volunteer for, and be paid on a commission basis on the bonds sold. Goldberg told Hottinger that she could expect to earn \$10,000.00 a year on the night calendar, and that this was a conservative estimate. Hottinger

was also told that she would not be eligible for the night calendar until she received her license as a bonding agent.

4. Subsequently, Hottinger was told by a co-worker, Dianne Pine that St. Paul night calendar hours that were vacated by the previous employee in Hottinger's position would not be given to Hottinger. Rather, Pine said that she would be taking those hours and that Hottinger would have to wait her turn to get on the night calendar.

5. After Hottinger received her bonding license, Goldberg offered Hottinger the only available night calendar hours at that time, working on the Minneapolis night calendar rotation. Hottinger told Goldberg that she did not want to work nights and weekends, and also stated that she did not want to work in Minneapolis. Hottinger did not mention the night calendar to Goldberg again.

6. Dick Stutz was also employed at GBC's St. Paul office. When he resigned, GBC had to quickly find employees to fill his hours on the St. Paul night calendar. GBC approached Hottinger and another employee, Kevin Leavitt, and they were each offered half of Stutz's nighttime hours on the St. Paul rotation. This offer amounted to one night a week and one weekend a month for Hottinger. Both Leavitt and Hottinger accepted the offered hours and worked the night calendar during January of 1993.

7. Stutz' resignation left the managerial position he had occupied vacant. GBC informed Hottinger that a bonding agent would replace Stutz, rather than a new manager. The job was first offered to Pine, who turned the position down, and then offered to Dennis Mitchell, who accepted the position. Mitchell was a bonding agent on the night rotation who had worked at GBC longer than Hottinger.

8. When Mitchell was chosen to replace Stutz, Hottinger thought Mitchell was going to be a bonding agent, not a manager. When Hottinger found out that Mitchell was going to be paid \$23,000 per year, while she was only making \$17,500 per year, she felt that the pay differential between their salaries was unfair and constituted discrimination.

9. GBC had actually hired Mitchell to take over Stutz's managerial position and to perform other duties beyond those which were a part of Hottinger's job duties. Mitchell also took over the St. Paul night calendar hours which Hottinger and Leavitt had been filling after Stutz left GBC. Mitchell had previously worked the night calendar exclusively.

10. On January 11, 1993, Hottinger was working with co-employee Kevin Leavitt at the St. Paul office of GBC. Leavitt asked Hottinger about her weight, and explained that he felt that people who were overweight needed counseling to overcome their "problem". Leavitt then asked Hottinger if she wanted to hear a joke. Hottinger said "no", but Leavitt proceeded to tell the joke anyway. The joke was about an overweight woman. Hottinger related the joke as, "Did you know that scientists have determined space may not be infinite but Delta Burke is?" Hottinger believed in good faith that this joke was sexually motivated, because Leavitt did not tell similar jokes about overweight men. The joke made Hottinger feel embarrassed, hurt, and upset.

11. Complainant talked about this incident with Diane Pine, and later called the home of Joan Thieman, GBC's general counsel, to complain about the incident. Thieman told Hottinger that she regretted that this had occurred and that she wanted employees to feel comfortable at GBC, and that she would schedule a meeting with Leavitt to discuss the incident. Thieman promised to get back to Hottinger with a response. Thieman did meet with Leavitt within the next two to three days to discuss the incident and to advise him that his conduct was inappropriate. Thieman also told Leavitt at this meeting that it was necessary for him to apologize to Hottinger.

12. Thieman thereafter contacted Hottinger who verified that Leavitt had apologized to her. Hottinger also explained to Thieman that she doubted the sincerity of Leavitt's apology. Thieman replied, "What else do you want me to do?" Hottinger responded, "I don't know." After the meeting between Leavitt and Thieman there were no further complaints from Hottinger regarding Leavitt.

13. On January 22, 1993, Hottinger received a favorable performance review and a thousand dollar a year raise. On that same day, it was determined that GBC had failed to pay Hottinger commissions on three bonds that she had previously issued. Hottinger was assured by Goldberg that the commissions would be paid at the next pay period.

14. On Friday afternoon, January 29, 1993, which was the next pay period, payroll checks came out. Upon receiving her check, Hottinger discovered what she thought was a \$40.00 negative discrepancy in the amount of her checks. Hottinger also learned at this time that she had been removed from the temporary night calendar assignment which she was filling after Stutz left his position at GBC..

15. Hottinger telephoned GBC's Minneapolis office, intending to speak with Goldberg, but she was informed that it was Goldberg's birthday and that she had left for the day. Hottinger spoke with the accountant for GBC, Troy Tracy, and asked him about the discrepancy in her check. He replied that he could not talk about it right then but would talk to her about it on Monday. Hottinger asked why he couldn't talk about it now, and Tracy replied, "Because it's fucking 4:30 and I want to go home." (Tr. pp. 63) Hottinger was extremely upset and offended by Tracy's comment.

16. Hottinger then hung up the phone, talked with Pine, and telephoned Thieman. Hottinger reported Tracy's conduct to Thieman, and said that she was upset about being harassed by another male employee. Hottinger also asked about the discrepancy in her paychecks and asked why she was taken off the night calendar rotation. Thieman said she would look into the matter and call Hottinger back. Hottinger was very loud, angry, and confrontational during this conversation. Thieman tried to calm Hottinger down, but was unsuccessful. Hottinger told Thieman that GBC was "cheating its employees" and demanded to be paid immediately what was owed to her.

17. Thieman talked with Tracy, and determined that in fact all the payroll checks had been miscalculated. The company had just begun a payroll conversion, going from a bi-weekly (26 checks/year) to a semi-monthly (24 checks/year) schedule of payroll disbursements, and this was the reason for the error. Tracy was also in the midst of processing tax forms, including W-2, 1099 forms, for the upcoming tax deadline. Thieman instructed Tracy to correct the specific error in Hottinger's payroll check. Tracy found that Hottinger had been underpaid a total of \$10.19.

18. Thieman called Hottinger back and informed her of the actual amount that was in error. Hottinger shouted at Thieman, saying that she wanted to be paid immediately. Thieman told Hottinger that she would look into both the check discrepancy and the night calendar complaints more thoroughly and get back to Hottinger on Monday. Hottinger was upset and angry when she talked to Thieman, mainly because of Tracy's disrespectful comment, and also because she thought Thieman seemed to rationalize Tracy's conduct by explaining that he was under a great deal of stress at the time due to the upcoming tax deadline..

19. Thieman told Goldberg about the conversations the following Saturday morning. After discussing the situation over three telephone conversations Goldberg and Thieman decided to meet with Hottinger the following Monday to discuss the incident.

20. On Monday February 1, 1993, Goldberg and Thieman met with Hottinger alone in GBC's St. Paul office. At the meeting, Thieman gave Hottinger a check for \$10.19 to cover the error that had been made in Hottinger's paycheck. Thieman also gave Hottinger a check for the commissions that were owed Hottinger at the time. Thieman then asked Hottinger if there was something other than the payroll error and the commissions that was bothering her, because Hottinger had made a comparison between Kevin Leavitt's joke and Troy Tracy's comment. Hottinger became upset and said that she thought both the incidents constituted harassment. Goldberg then told Hottinger that she was not on the night calendar because there had never been an opening. Hottinger grew more upset and protested, saying that Stutz's resignation had in fact left an opening on the night calendar. Hottinger yelled at Goldberg and Thieman, saying that GBC was a "lousy company" and "you're cheating your employees." Goldberg then nodded to Thieman and Thieman told Hottinger that she was terminated. When Hottinger asked Goldberg and Thieman why, they refused to tell her.

21. In October of 1993, GBC adopted a policy manual and distributed it to the employees. There was no policy manual in place during Hottinger's employment, but GBC's employee handbook codified policies and procedures that were in effect prior to the handbook's promulgation. Tr. p. 285. GBC's employee handbook lists the following as dischargeable offenses:

1. Falsification of client record;
2. Falsification of any report, including but not limited to bond recap reports, time cards, mileage, or expense reports, cash receipts, powers, credit card receipts;
3. Theft;
4. No call-no show;
5. Sleeping on duty;
6. Canceling work without a valid reason;
7. Falsification of the employment application;
8. Noncompliance with GBC's policies and procedures;
9. Abusive behavior or threats to a client or coworker;
10. Use of alcohol or drugs on the job;
11. Insubordination; and
12. Willful, wanton or deliberate misconduct.

Ex. 1 p. 15-16.

22. Other employees at GBC had committed dischargeable offenses but were less severely disciplined than Hottinger:

1. Tom Dwyer: Intoxicated at work, 2/18/91. Insubordination towards a manager, 2/18/91. Noncompliance with GBC policies, 3/28/91. (Failure to get a co-signer on a bond). Engaged in threatening and abusive conduct, 5/6/91. Ex. 3.

2. Diane Pine: Noncompliance with GBC policies (numerous instances of failure to follow GBC's policies, her work is characterized as sloppy, inaccurate, and untimely). Ex. 4.
3. Dean Johnson: Noncompliance with GBC policies (charge slip not signed by cardholder). No call-no show, (12/15/92). Ex. 5.
4. Dennis Mitchell: Abusive behavior to coworker, 7/12/92. (Stapling receipts). Ex. 6.
5. Linda Singleton: Noncompliance with GBC policies (excessive absenteeism), (bond incorrectly inputted). Cancelling work without a valid reason. 6/9/92 (memo outlined several instances).
6. Jim Crider: Noncompliance with GBC policies (failure to secure bonds correctly), (failure to activate security system). Ex. 7.
7. Kevin Leavitt: Noncompliance with GBC policies (working out of his territory), (failure to correctly write and secure and calculate bonds). Ex. 9.
8. Marsha Hunt: Noncompliance with GBC policies (late recap reports, taking \$500 of GBC's money home, chronic tardiness, customer complaint regarding request to purchase illegal drugs), (falsification of time card). Ex. 10.
9. Joe Lewis: Noncompliance with GBC policies (failure to secure bonds correctly). Ex. 11.
10. John Parkinson: No call-no show. Ex. 12.

None of the above individuals were immediately terminated for committing dischargeable offenses. They were all provided verbal and written notice of their deficiencies and given an opportunity to remediate the situation. Hottinger was not warned that her conduct was unacceptable either on Friday January 29, 1992, or on Monday, February 1, 1993.

23. Following her termination, Hottinger filed a claim for unemployment compensation benefits with the Minnesota Department of Economic Security. In response to Hottinger's application for unemployment compensation benefits, the Department indicated to Hottinger that her services were no longer needed. They did not contest Hottinger's unemployment claim, claimed no misconduct or insubordination on the part of Hottinger. Ex. 14. As a result of her unemployment compensation claim, she was determined to be eligible for unemployment compensation benefits in the weekly benefit amount of \$233.

24. Upon her termination from employment, Hottinger received severance pay in lieu of notice in the amount of \$364. This severance pay was applied for the period of January 31, 1993 to February 6, 1993. Therefore, Hottinger received no employment compensation benefits for that week. Ex. 19.

25. Following her termination from employment, Hottinger felt depressed. She rarely got out of bed, except to watch T.V. She didn't bathe, shower, or go out of the house. She did not attend the Klondike Kate Review and Pageant, an annual St. Paul Winter Carnival event, which she had participated in each year. Tr. p. 74. She did not seek or receive professional counseling or therapy for her depressed feelings.

26. Hottinger's sister prepared letters and sent out resumes to prospective employers on behalf of Hottinger following her termination from GBC. Towards the end of April 1993, Hottinger received a response to one of her letters. She interviewed for a position as a convenience store manager at Total Service Stations. She was offered the position and began her employment approximately the first of May, 1993. She was paid \$20,000 per year in salary and was also entitled to a bonus. Hottinger was paid a bonus for 1993 in the approximate amount of \$6,000. Hottinger earned more in salary and bonus from Total Service Stations than she would have earned had she remained at GBC.

27. At the time of her discharge from GBC, Hottinger was paid \$1,458.33 per month or \$17,500 per year. Because Hottinger was earning more at Total Service Stations Convenience Store, she suffered no wage loss following the beginning of that employment. However, if Hottinger had continued to work at GBC until May 1, 1993 (the approximate first day of her new employment), she would have earned three month's of salary at \$1,458.33 per month for a total of \$4,374.99. This amount in salary assumes no raises would have been given to her during that three-month period. It also assumes no commissions, because she was no longer on the night calendar.

28. Hottinger has received income in the following amounts between her discharge and the first day of her new employment at Total Service Stations:

Unemployment Compensation	11 Weeks at \$233 per week = \$2,563
Severance Pay	<u>364</u>
TOTAL	\$2,927

29. Subtraction of Hottinger's income from unemployment compensation and severance pay she has received, from the wages she would have earned had she remained employed at GBC, yields \$1,447.99.

30. Hottinger has engaged in reasonable efforts to mitigate her damages.

31. GBC has in place a written sexual harassment policy. This policy has been in effect at GBC since at least May 8, 1992. The policy provides in part as follows:

No retaliation of any kind will occur because you have reported an incident or suspected sexual harassment. Ex. 19, Goldberg Bonding Company, Inc. Policy Against Sexual Harassment, p. 2.

32. On October 28, 1993, Hottinger filed a charge of discrimination with the Minnesota Department of Human Rights, alleging unlawful discrimination on the basis of sex, sexual harassment, and unlawful reprisal.

33. Because the Department of Human Rights had not issued a determination with respect to Hottinger's charge of discrimination within 180 days from the filing of the charge, Hottinger requested that a hearing be held before and Administrative Law Judge pursuant to Minn. Stat. § 363.071, subd. 1a (1990). On June 27, 1994, a Notice of and Order for Hearing was issued in this matter.

34. Pursuant to Respondent's Motion to Dismiss at the hearing, the charges of sex discrimination and sexual harassment have been dismissed. The only remaining issue is that of reprisal discrimination.

35. Parties waived the requirements set forth in Minn. Stat. § 363.071, subd. 2 (1990) for personal service on the Respondent and service by registered or certified mail on the Complainant.

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

CONCLUSIONS OF LAW

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

2. Goldberg Bonding Company is an employer as defined in Minn. Stat. § 363.01, subd. 17, and Nancy Hottinger was an employee 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 an unfair employment practice. Sexual harassment is discrimination for the purposes of determining sex-based discrimination. Minn. Stat. § 363.01, subd. 14.

4. The three-step analysis established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) applies to sex discrimination, sexual harassment and reprisal cases under the Minnesota Human Rights Act. Hubbard v. United Press Int'l, Inc., 330 N.W.2d 428 (Minn. 1983). Using this analysis, the Complainant has the burden to establish a prima facie case of discrimination, creating a rebuttable inference of discrimination. If the Complainant establishes a prima facie showing, the burden of production shifts to the employer, who must articulate legitimate nondiscriminatory reasons for the actions alleged to be discriminatory. If the employer articulates legitimate nondiscriminatory reasons for its actions, the Complainant may present evidence showing that the reasons articulated are a mere pretext for discrimination or are otherwise unworthy of belief.

5. The burden of proof in an action involving violations of the Minnesota Human Rights Act remains, at all times, with the Complainant.

6. To establish a prima facie case of sex discrimination in employment the following factors must be met:

1. The employee is a member of a protected class;
2. The employee sought and was qualified for work the employer was making available to others;

3. The employee, despite her qualifications, was denied the same opportunities to perform that work as similarly qualified non-members of the protected class; and,
4. The employer assigned a similarly qualified non-member of the protected class to do the same work. Sigurdson v. Isanti County, 386 N.W.2d 715, 720 (1986).

7. Complainant has failed to establish that she and Dennis Mitchell were engaged in the same work activities. Though there may have been some overlap in their job duties, GBC presented ample evidence of its intent to have Mitchell take over Dick Stutz's former position as manager. Complainant has not shown that her job duties as a bonding agent were the same as the job duties of a manager. All that Complainant has managed to show is that she was under the mistaken belief that Mitchell was to remain a bonding agent with the same job duties that she had as a bonding agent. Because the evidence amply supports the conclusion that this belief is mistaken, Complainant has failed to establish a prima facie case of sex discrimination.

8. 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:

- (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.
9. A prima facie case of sexual harassment is established by showing that:
- (1) The employee is a member of a protected class;
 - (2) The employee was subjected to unwelcome sexual harassment;
 - (3) The harassment complained of was based on sex;
 - (4) The harassment affected a term, condition or privilege of employment, or created an intimidating, hostile, or offensive working environment; and

- (5) The employer had actual or imputed knowledge of the harassment and failed to take prompt remedial action.

Klink v. Ramsey County, 397 N.W.2d 894, 901 (Minn. Ct. App. 1986). See, also, Bersie v. Zycad Corp., 399 N.W. 2d 141, 146 (Minn. App. 1987), citing Hanson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982)

10. Complainant has failed to establish a prima facie case of sexual harassment. The incident of the joke told by Kevin Leavitt was isolated and not part of a continuing series of acts of harassment and did not create an intimidating, hostile, or offensive working environment. It was undertaken by a coemployee, not a supervisor, and the employer took timely and appropriate action. The "because its fucking 4:30 and I want to go home" comment made by Troy Tracy was not used in a sexual context as a surrogate for intercourse. Rather, he apparently used it as profanity or in reaction to stressful circumstances. The employer does not have a duty to maintain a pristine work environment, and isolated incidents of coemployee misconduct which are dealt with in a timely and appropriate manner are not actionable as sexual harassment. Continental Can Co. v. State, 297 N.W.2d 241, 249 (Minn. 1980)

11. In order to establish a prima facie case of reprisal discrimination in violation of the Minnesota Human Rights Act, the Complainant must proffer evidence of:

- (1) Statutorily protected conduct by the Employee;
- (2) Adverse employment action by the Employer; and
- (3) A causal connection between the two acts.

Hubbard v. United Press Int'l., Inc., 330 N.W.2d 428, 444 (Minn. 1983);
Williams v. Metropolitan Waste Control Com'n, 781 F.Supp. 1424, (D.Minn.1993)

12. Complainant has established a prima facie case of reprisal discrimination by a preponderance of the evidence. Hottinger in good faith believed she had been discriminated against and sexually harassed, and she engaged in the statutorily protected activity of informing her employer (GBC) of this. GBC took employment action which was adverse to Hottinger by terminating her. The causal link between the actions of the employee and the employer may be established directly or "indirectly by evidence of circumstances that justify an inference of retaliatory motive, such as a showing that the employer has actual or imputed knowledge of the protected activity and the adverse employment action follows closely in time." Hubbard 330 N.W.2d at 445. GBC terminated Ms. Hottinger within three weeks of her complaint to Thieman regarding Kevin Leavitt's joke, and one business day following her complaint to Thieman regarding Troy Tracy's comment. This evidence, viewed in the context of the other evidence and testimony available, establishes a prima facie case of reprisal discrimination.

13. Because a prima facie case of reprisal discrimination has been established, a presumption of unlawful discrimination is created and the burden of production shifts to Respondent to articulate some legitimate nondiscriminatory reasons for its actions. Greiner v. City of Champlin, D.Minn.1993, 816 F.Supp. 528.

14. Respondent's offered rationale regarding Complainant's purported "insubordination" is not a legitimate nondiscriminatory reason for its conduct as credible evidence in the case shows that other employees were not similarly terminated for other dischargeable offenses. This fact was a discernible, discriminatory and causative factor in the adverse employment actions taken by the Respondent against Complainant.

15. Complainant has established by a preponderance of the evidence that Respondent's proffered rationale is merely a pretext for discrimination.

16. The Respondent engaged in an unfair discriminatory practice in violation of the Minnesota Human Rights Act by discharging the Complainant in reprisal for her having made good faith reports to GBC of sex discrimination and sexual harassment.

17. The Respondent has the burden of proof to establish that the Complainant failed to mitigate her damages.

18. The Respondent failed to carry its burden of establishing that the Complainant failed to mitigate her damages.

19. Minn. Stat. § 363.071, subd. 2 (1990), permits an award of back pay to compensate a victim of discrimination for the wages she would have earned had she not been discriminated against. In this case, the Complainant's lost net wages totaled \$1,448.

20. Minn. Stat. § 363.071, subd. 2 (1990), permits an award of compensatory damages up to three times the amount of actual damages sustained by the Complainant. The Complainant is not entitled to double or treble compensatory damages.

21. Under Minn. Stat. § 363.071, subd. 2 (1990), victims of discrimination are entitled to compensation for mental anguish and suffering resulting from discriminatory practices. In this case, the Complainant experienced mental anguish and suffering as a result of the Respondent's discriminatory conduct and is entitled to compensation for the mental anguish and suffering she has sustained in the amount of \$5,000.

22. Under Minn. Stat. § 363.071, subd. 2, and the standards set forth in Minn. Stat. § 549.20 (1990), punitive damages may be awarded for discriminatory acts where there is clear and convincing evidence that the acts of the employer show a deliberate disregard for the rights or safety of others. In this case, the Complainant is entitled to punitive damages in the amount of \$1,000.

23. Minn. Stat. § 363.071, subd. 2 (1990), requires the award of a civil penalty to the State when an employer violates the provisions of the Human Rights Act. Taking into account the seriousness and extent of the violation, the public harm occasioned by it, the financial resources of the Respondent, and whether the violation was intentional, the Respondent should pay a civil penalty to the State in the amount of \$5,000.

24. Complainant is entitled to reasonable attorney's fees and costs pursuant to Minn. Stat. 363.071, subd. 2 and 363.14, subd. 3. Within 15 days of the date of filing the Findings Fact, Complainant's counsel shall deliver

the court and respondent's counsel a list of work and costs incurred in this matter. The list shall indicate the total hours involved in the representation, the hourly rate for each attorney working on the case, and the total amount. Complainant's counsel shall also provide affidavits from two attorneys in the area of employment law attesting to the reasonableness of the fees claimed. Respondent's counsel shall have ten days to interpose its objections to the reasonableness of the fees claimed.

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

ORDER

IT IS HEREBY ORDERED THAT:

1. Complainant's claim of sex discrimination is dismissed.
2. Complainant's claim of sexual harassment is dismissed.
3. The Respondent shall pay total damages to Nancy Hottinger in the amount of \$7,448 calculated as follows:

Compensatory damages in the amount of lost wages	\$1,448.
Damages for mental anguish and suffering	5,000.
Punitive damages	1,000.
Total	<u>7,448.</u>

The Respondent shall also pay Hottinger prejudgment interest on lost wages of \$1,448. from February 1, 1993, pursuant to § 334.01 (1990).

4. That Judgment shall be entered against Respondent for violation of the Minnesota Human Rights Act, in favor of the State of Minnesota for a civil penalty in the amount of \$5,000 to be payable to the general fund of the State of Minnesota.

5. An order awarding attorney's fees and costs to the Complainant will be issued at a later date.

Dated this 6th day of December, 1994.

PHYLLIS A. REHA
Administrative Law Judge

Reported: Reporters Diversified Services
Duluth, Minnesota
(218) 722-4733 (800) 213-2243

NOTICE

Pursuant to Minn. Stat. § 363.071, subd. 2, this Order is the final decision of this case and the Commissioner of the Department of Human Rights. Any other person aggrieved by this may seek judicial review pursuant to Minn. Stat. § 14.64 through 14.69.

MEMORANDUM

Complainant, Nancy Hottinger has made three allegations as part of her claim that Respondent, GBC, has violated her rights under the Minnesota Human Rights Act:

1. Sex Discrimination
2. Sexual Harassment
3. Reprisal Discrimination

At the hearing, GBC moved to dismiss all three of the above-listed allegations as a matter of law arguing that Hottinger failure of Complainant to establish a prima facie case for any of the three allegations. The specific formulation of a prima facie case must be modified to fit the particular facts of each case. Hubbard v. United Press Int'l, Inc., 330 N.W.2d 428, 444 (Minn. 1986). Each of the allegations is discussed individually below.

1. Sex Discrimination

Complainant's allegations of unequal wages based on sex are not supported by a sufficient showing of proof to establish a prima facie case of gender discrimination. A party may establish a prima facie case of sex discrimination under the Minnesota Human Rights Act by showing that the treatment she was given was so at variance with what would reasonably be anticipated, absent discrimination, that discrimination is the probable explanation. Greiner v. City of Champlin, 816 F.Supp. 528 (D.Minn.1993) Disparate treatment discrimination cases, such as the claim of sex discrimination alleged here, require analysis of the three-part McDonnell-Douglas test. Miller v. Centennial State Bank, 472 N.W.2d 349 (Minn. Ct. App. 1991)..

In this case, the Complainant claims that another bonding agent, Dennis Mitchell, took over the job which she had previously done and was paid a higher wage. The Respondent has offered testimony that Mitchell did not in fact begin this job until after Complainant had been terminated, and that it was the intent of the employer that Mitchell would take over Dick Stutz managerial job, including duties which Complainant had not done in her capacity as a bonding agent. The employee must show that the two had substantially similar job duties and qualifications; however, Complainant admitted during cross examination that at no time did she and Mitchell work side by side performing the same duties. In fact, Mitchell worked exclusively on the night rotation. This difference in job duties provides a sufficient explanation of the wage differential to defeat Complainant's establishment of a prima facie case of gender discrimination. Respondent has in fact demonstrated that the male employee who was to be paid a higher salary than Hottinger, had different job duties, and was intended by the employer to take on manager

responsibilities. This is an adequate explanation for the wage differential and no prima facie case of sex discrimination has been established.

2. Sexual Harassment

To be actionable, sexual harassment must be sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive work environment. Evidence of isolated incidents generally will not satisfy this burden. Evans v. Ford Motor Co., 768 F.Supp. 1318 (D.Minn.1991), amendment denied, stay vacated, 784 F.Supp. 618.

The statute requires a showing that there have been ongoing, pervasive comments of a sexual nature. In considering these elements, the nature, frequency, intensity, location, context, duration, and object or target of the objectionable language must be considered in determining its effect on female workers. Klink v. Ramsey County, 397 N.W.2d 894 (Minn. Ct. App. 1986). It must be kept in mind, however, that an employer is not required to maintain a pristine working environment. Continental Can Co., Inc. v State, 297 N.W. 2d 241, 249 (Minn. 1980) (an isolated incident in which a "racial slur" was made did not constitute "ongoing").

In order to establish a cause of action under the Minnesota Human Rights Act, an aggrieved employee must show that the employer knew or should have known of the harassing activity complained of, and that the employer took no reasonable steps to remedy the harassment. The employer's liability thus springs from the employer's own knowledge and actions, not merely the actions of the perpetrating employee. In re Czuba, 146 B.R. 225 (Bkrtcy.D.Minn.1991). An employer has an affirmative duty to investigate complaints of sexual harassment and deal appropriately with the offending personnel. Gillson v. State Dept. of Natural Resources, 492 N.W.2d 835 (Minn. Ct. App. 1992), reversed.

The actions complained of were an incident of swearing by one coworker and the telling of a joke by another coemployee. With respect to the statement by Tracy "because it is fucking 4:30 and I want to go home", there was no evidence that the use of the word "fuck" was in a sexual context as a surrogate for intercourse. Rather, Tracy apparently used it as a profanity or in reaction to stressful circumstances. Nor was this type of language shown to be sufficiently pervasive so as to constitute harassment.

Kevin Leavitt's telling of a joke about an overweight woman was clearly unwelcome, but was not overtly sexual in nature. Even if the joke could be construed to be sexually motivated since he told no similar jokes about overweight men, it was an isolated incident. In addition, Respondent took action in a timely manner to investigate and eliminate the harassment complained of, and Complainant has admitted that there were no further problems from Leavitt. The Respondent has fulfilled its statutory duty and the allegation of sexual harassment is dismissed.

3. Reprisal Discrimination

It is not necessary that Hottinger establish that the complained of conduct was in fact actionable sexual harassment. Rather, it is enough that Hottinger had a good faith, reasonable belief that the conduct was sexual harassment. Thompson v. Campbell, 845 F. Supp. 665m 675 (D. Minn. 1994); Wentz v. Maryland Cas. Co., 869 F.2d 1153 (8th Cir. 1989). The causal link between activity which is protected under the Minnesota Human Rights Act and

the adverse action of the employer may be shown by such temporal proximity between the two as to justify the inference of a retaliatory motive. Evans Ford Motor Co., 768 F.Supp. 1318 (D.Minn.1991) amendment denied, stay vacated, 784 F.Supp. 6.

Complainant has established a prima facie case of reprisal discrimination by a preponderance of the evidence. Hottinger in good faith believed she had been discriminated against and sexually harassed, and she engaged in the statutorily protected activity of informing her employer (GBC) of this. GBC took employment action which was adverse to Hottinger by terminating her. A causal link between the actions of the employee and the employer may be established directly or "indirectly by evidence of circumstances that justify an inference of retaliatory motive, such as a showing that the employer has actual or imputed knowledge of the protected activity and the adverse employment action follows closely in time." Hubbard, 330 N.W.2d at 445. GBC terminated Hottinger within three weeks of her complaint to Thieman regarding Kevin Leavitt's joke, and one business day following her complaint to Thieman regarding Troy Tracy's comment. This evidence, viewed in the context of the other evidence and testimony available, establishes a prima facie case of reprisal discrimination.

The pretextual nature of the reasons proffered by the Respondent for Hottinger's termination is underscored by the Respondent's failure to issue warnings to the Complainant prior to her discharge notifying her of deficiencies in her conduct and providing her an opportunity to remediate. Other employees had committed misconduct but were not terminated. Evidence introduced which showed that in other episodes of employee misconduct, Respondent had given warnings and an opportunity to correct such misconduct prior to termination. Several examples of these "warning letters" which had been placed in other employee's personnel files were used to illustrate this practice.

The employer testified that Complainant's conduct was more serious than other employee's misconduct, because her anger was directed toward management and not merely toward other employees, and that this was the reason for her termination. However, at least one other employee was charged with insubordination towards a manager, and was warned, not discharged for that conduct. (Ex. 3).

Even if the Respondent had a good faith belief that discipline was justified in response to the behavior of the Complainant toward management; her complaint of sexual harassment was only a minor factor in the termination decision; if sex is shown to be a discernible factor motivating the negative action, the employer cannot avoid liability. If the evidence were to establish that the Respondent had more than one reason for terminating the Complainant from her position, this would constitute a "mixed motive" case. The Minnesota

Supreme Court dealt with the question of "mixed motives" in Anderson v. Hunter, Keith, Marshall and Co., 417 N.W. 2d 619 (Minn. 1989). In that case, the trial court determined that while there was some evidence a legitimate, nondiscriminatory reason for the Plaintiff's discharge (dissatisfaction with her job performance), the plaintiff's pregnancy was a "discernible, discriminatory, and causative factor ...of the defendant's discharge of plaintiff." The Minnesota Supreme Court specifically held that when " a substantial causative factor entering into the decision to discharge an employee" is based upon an impermissible factor, the Minnesota Human

Rights Act affords an employee remedies against the employer, including damages. 417 N.W. 2d at 624. The Supreme Court indicated that the test employed by the trial court, namely, whether the impermissible reason for discharge was a "discernible discriminatory and causative factor," was consistent with the McDonnell Douglas analysis and that the McDonnell Douglas analysis should be employed in interpreting the Minnesota Human Rights Act. The record in this case supports a determination that the Complainant's complaints of sexual harassment and/or sex discrimination were factors in her termination. The Complainant need not show that these complaints were the only factors, but that they were discernible and causative factors in her termination from employment..

In order to meet the statutory requirements of a reprisal case, the Complainant need not make a showing of valid sexual harassment, rather she need only express a good faith belief that the reprisal was based on her act of engaging in statutorily protected conduct. The public policy behind this section is to avoid causing a chilling effect upon the reporting of incidents of sexual harassment. The Complainant has met the requirement of showing good faith relative to the reprisal claim.

4. Relief

Minn. Stat. § 363.071, subd. 2 (1990), authorizes an award of compensatory damages to the victims of discrimination under the Minnesota Human Rights Act. The general purpose of the damages provision is to make victims of discrimination whole by restoring them to the same position they would have attained had no discrimination occurred. Anderson v. Hunter, Keith, Marshall and Co., *supra* at 626; Brotherhood of Railway and Steamship Clerks v. Balfour 303 (Minn. 1978), 229 N.W.2d 3, 13 (1975). Persons complaining of discrimination, however, "do have the duty to minimize damages by using reasonable diligence in finding other suitable employment. Anderson, *supra* 417 N.W.2d at 626, quoting Ford Motor Company v. EEOC, 258 U.S. 219, 231 (1982).

The employer bears the burden of proving that a complainant did not mitigate her damages. Sias v. City Demonstration Agency, 588 F.2d 692 (9th Cir. 1978); Sprongis v. United Airlines, 517 F.2d 387 (7th Cir. 1975); accord Henry v. Metropolitan Waste Control Commission, 401 N.W.2d 401, 406 (Minn. 1987). In order to bear its burden, the employer must show that (1) substantially equivalent positions were available for the Complainant to take and (2) the Complainant did not exercise reasonable diligence in seeking such positions. Wooldridge v. Marlene Industries, 49 Fair Empl. Prac. Cus. (BNA) 1455 (6th Cir. 1989). In this case, Hottinger testified that she applied for unemployment compensation benefits and that her sister sent out letters and resumes to potential employers. She interviewed with the first employer who responded favorably to her job search. She interviewed for the position, and

accepted it immediately and began employment as requested by the employer. work search is considered reasonable efforts to secure employment taking into consideration her depression and anxiety she suffered following her termination from GBC. The fact that the Complainant accepted the first job offer that was made to her in response to her job search indicates that she is ready, willing, and able to work. The Administrative Law Judge is persuaded that Hottinger has acted reasonably. The Respondent has not borne its burden to show that the Complainant failed to mitigate her damages.

After adjusting for unemployment compensation benefits received and the severance pay that she received from GBC in lieu of notice, Hottinger's lost wages for the period from her termination (February 1, 1993) to the first day of her new employment (May 1, 1993) are \$1,448.

The Judge has determined that actual compensatory damages in the amount of \$1,448 should be awarded in this case, plus prejudgment interest from the date of termination. That amount will fully and adequately compensate Hottinger and should not be trebled (as urged by the Complainant) or doubled. There was no other evidence of actual compensatory damages to support doubling or trebling.

Under Minn. Stat. § 363.071, subd. 2 (1990), victims of discrimination are entitled to recover for mental anguish and suffering. In this case, the Administrative Law Judge is persuaded that Hottinger is entitled to an award of \$5,000 for the mental anguish and suffering she endured as a result of the employer's retaliation which resulted in the Complainant's discharge. Because the sex discrimination and sexual harassment claims have been dismissed, it would not be appropriate to award damages for mental anguish and suffering on those two charges. However, the record demonstrates that Hottinger suffered significant mental anguish as a result of her termination from employment. The evidence at the hearing establishes that the Complainant exhibited symptoms of depression. She rarely got out of bed, except to watch T.V. She didn't bathe, shower, or go out of the house for nearly three months. She did not attend Klondike Kate Review and Pageant, an event to which she looked forward to each year having held the title of Klondike Kate in the past. In addition, the Complainant broke into tears during the testimony at the hearing, and it is evident that she is still very upset by the treatment she received. Under these circumstances, damages for mental anguish and suffering should be limited to \$5,000.

Pursuant to Minn. Stat. § 363.071, subd. 2, provides that punitive damages may be awarded to discriminatory acts when there is clear and convincing evidence that the employer's acts show a deliberate disregard for the rights and safety of others. In this case, the evidence shows that GBC deliberately disregarded Hottinger's rights when a decision was made to terminate her for complaining about sexual harassment and sex discrimination. Because of Hottinger's own inappropriate behavior on the date of discharge, it is possible that the Respondent had a "mixed motive" in terminating Hottinger from her employment. Thus, the Administrative Law Judge finds that punitive damages in the amount of \$1,000 is a sufficient award. The Judge has considered the factors contained in Minn. Stat. § 549.20 (1990).

Finally, Minn. Stat. § 363.071, subd. 2 (1990), requires the award of a civil penalty to the state when an employer violates the provisions of the Minnesota Human Rights Act. Taking into consideration the seriousness and extent of the Respondent's violation, the public harm occasioned by it, a civil

penalty is appropriate. Although there was no specific evidence presented at the hearing regarding the Respondent's current financial

condition, the Respondent operates a number of criminal bail bond offices and has done so for many years. Thus, it appears to be financially stable. The factors were taken into account in determining the amount of civil penalty the Respondent must pay to the state. The amount of the civil penalty reflects a substantial investment of public resources in the hearing and determination of this matter. Civil penalty shall be awarded to the State of Minnesota in the amount of \$5,000.

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