

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Leonard Howard,

Complainant,

v.

Northwest Airlines,

Respondent.

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

The above-entitled matter came on for hearing before Administrative Law Judge Allen E. Giles on February 27, 28, 29 and March 1, 4 and 5, 1996 at the Minnesota Office of Administrative Hearings, 1700 Washington Square, 100 Washington Avenue South, Minneapolis, Minnesota. The record closed on May 9, 1996, the date that Complainant's Reply Brief was filed.

Reino J. Paaso, Attorney at Law, 915 Grain Exchange Building, 400 South Fourth Street, Minneapolis, Minnesota 55415, appeared on behalf of the Complainant.

Sherry L.S. Trudeau and Donald Chance Mark, Jr., Meagher & Geer, PLLP, Attorneys at Law, 4200 Multifoods Tower, 33 South Sixth Street, Minneapolis, Minnesota 55402-3788, appeared on behalf of the Respondent.

NOTICE

Pursuant to Minn. Stat. § 363.071, subd. 2 and 3, 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 person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. §§ 14.63 through 14.69.

STATEMENT OF ISSUES

Whether Respondent Northwest Airlines discharged Complainant Leonard Howard, or otherwise discriminated against him in the terms and conditions of his employment because of race in violation of Minn. Stat. § 363.03, subd. 1;

Whether Respondent's actions toward Complainant subsequent to his complaints about the shipment of a package constitute unlawful reprisals in violation of Minn. Stat. § 363.03, subd. 7.

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

FINDINGS OF FACT

1. Complainant Leonard Howard is an African-American male who resides at 1342 West Maynard, Apartment 497, St. Paul, Minnesota 55116.

2. Northwest Airlines, Inc. is an airline common carrier headquartered in Minneapolis, Minnesota. The Company employs thousands of persons within the State of Minnesota.

3. Leonard Howard began employment with Northwest Airlines, Inc. (hereinafter also referred to as "NWA") in December of 1989 as a part-time equipment service employee (hereinafter referred to as "ESE") at the Kansas City International Airport. Equipment service employees have the responsibility for loading and unloading passenger luggage and baggage onto or off of airplanes, delivering luggage to airplanes prior to takeoff and transferring luggage from planes landed from the plane to the baggage pickup area for customers.

4. Mr. Howard's probationary period of employment with NWA ended on July 31, 1990, at which time his supervisor was required to make periodic evaluations of his performance and recommend whether he should be retained as a permanent employee. Mr. Howard's initial supervisor gave 30-day, 60-day and 180-day assessments of Mr. Howard's progress during the probationary period. For the 30-day period assessment, he assessed Mr. Howard as being average except for the category "attendance & punctuality". Exhibit 22. Although Mr. Howard passed his probationary period, his work attendance problems continued during his employment at NWA.

NWA's Attendance Policy

5. NWA has a strict attendance policy. The attendance standard is summarized as follows:

Every employee is expected to report for every work assignment. Of course, it is recognized that employees will occasionally be absent for legitimate and/or uncontrollable reasons. It is expected, however, that employees will make every reasonable effort to stay in good health, obtain appropriate medical attention, and manage their personal lives in order to minimize the number of absences from the workplace. Excessive absenteeism, even that which results from bona fide illnesses or injuries for which doctor's certificates have been submitted and/or payment approved, may be grounds for termination. This is not because the

employee is guilty of misconduct, but simply because he/she is incapable of performing or unwilling to perform the job on a regular basis.

Exhibit 53. The general basis for NWA's attendance policy is explained by the Company as follows:

Northwest Airlines operates an air transportation system for public convenience and necessity. In order to provide safe and reliable air transportation and superior customer service every day, all employees are expected to report to work regularly and on time.

Id.

6. Managers and supervisors have the responsibility for coaching employees to improve their attendance if there is a problem. According to the Company's sick leave policy, a manager or supervisor should consider formal discipline whenever an employee has had three or more days of accountable absence within any continuous six-month period. This assumes that the employee has failed to respond to previous coaching on their attendance problems. Exhibit 53 at 11.

NWA's Performance Development and Discipline Policy

7. NWA has in place a performance development program that both recognizes employees for good performance and places responsibility on poorly performing employees to improve their performance. Exhibit 45.

8. NWA's performance development program classifies performance problems in the following categories: Safety, Conduct, Attendance and Work Performance. Id. at 5. Under performance development policy, coaching will occur for failure to comply with standards expected of employees in these performance evaluation categories with one exception: if the performance conduct is serious, it may warrant bypassing coaching and taking an appropriate disciplinary action. Id. at 5 and 6.

9. NWA's performance development program has three levels of discipline available to a manager for addressing problems. They include (a) Level One Reminder; (b) Level Two Reminder and (c) Decision Making Leave. Normally, managers are expected to use these levels of discipline in progression in an attempt to correct persistent problems, however, discipline can be initiated at any one of the three levels depending on the seriousness of the problem. Id. at 6.

10. If a Level One Reminder is issued to an employee, the discipline remains on the employee's file for nine months. Tr. Vol. IV at 718. If after nine months the employee commits no additional infractions, the Level One Reminder is removed from the employee's file. Tr. Vol. IV at 716-18. However, if the employee commits another offense in the same performance area within the nine-month period, or if an employee commits a serious offense that warrants a stronger level of discipline, the Level Two Reminder is issued. The Level Two

Reminder remains in the employee's file for 12 months. Tr. Vol. IV at 718-19. Where no further infractions occur during the 12-month period, the Level Two Reminder is removed from the employee's file. Tr. Vol. IV at 720.

11. The highest level of discipline prior to termination, the Decision Making Leave (also referred to hereafter as "DML") may be issued under the following three circumstances: (1) when an employee commits a third offense in a performance area in which the employee has an active Level Two Reminder; (2) when an employee has two active Level Two Reminders in any areas and commits a third offense in any performance area; or (3) when the employee's actions are so severe that a DML is warranted. The DML remains in an employee's file for 18 months. Tr. Vol. IV at 720-21, 744-46. Once an employee has reached the DML level, any inappropriate conduct that arises to the level of discipline, whether in an attendance area, the safety area, the work performance area or the conduct area, may result in termination. Tr. Vol. V at 745-46.

Mr. Howard's Work History

12. Mr. Howard worked as a part-time ESE at Kansas City International Airport until April of 1991 when he obtained full-time employment with NWA by transferring to National Airport in Washington, D.C. A review of his attendance at work from May 11, 1991 through September 29, 1991 showed that he missed 48 hours from work on account of sickness or injury. Mr. Howard was absent on three occasions; all were either immediately before or after scheduled or trade days off. In letters dated July 18 and October 3, 1991, Mr. Howard received coaching in writing from his Manager regarding attendance and indicating that his attendance was unsatisfactory. As a result of his failure to respond to the coaching, he was required after October 3, 1991 to provide a doctor's certificate for future absences claimed due to illness or injury. Exhibit 24.

13. Mr. Howard transferred to the Minneapolis-St. Paul International Airport on May 25, 1992. Exhibit 25. After four sick leave absences in less than one month, he was coached by his manager, Kathryn Wallace. On about June 21, 1992, Ms. Wallace called Mr. Howard's attention to the pattern of sick leave absences occurring around scheduled days off. Mr. Howard informed her that he had not had a vacation and that he needed some time off. Ms. Wallace explained to him that it was inappropriate to take sick time for days off and informed him that he needed to improve his reliability. At the time of the coaching in June, Mr. Howard had been absent the following days: May 26, June 18, 19, and June 20, 1992. Exhibit 25.

14. After the coaching in June, Mr. Howard was absent from work four days, July 9, August 3, 4 and 5, 1992 (in the following six weeks). Exhibit 25. On August 6, 1992, he was disciplined by Ms. Wallace; she gave him a Level One Reminder because of his attendance problem. The Level One Reminder provided, in part, as follows:

We discussed the importance of attendance reliability for yourself, your fellow employees, and the efficient operation of the Company. You need to show significant and immediate improvement in your attendance reliability.

You have given me your commitment to improve your attendance in this meeting. I am confident that you will improve your attendance reliability.

Exhibit 26.

15. On December 24, 1992, Mr. Howard was again coached on his attendance problem. At that time, his attendance record indicated one tardy and three days absent since the Level One Reminder was issued. Exhibit 27. Mr. Howard was again coached on attendance problems on February 9, 1993. On May 3, 1993, he was disciplined again because of his attendance problems, he received a Level Two Reminder. At the time of the Level Two Reminder, his attendance record showed that he had taken eight sick days (December 5, 6, 7; February 7, 8; April 7, 8, 9) since the Level One Reminder had been issued. The Level Two Reminder issued to Mr. Howard stated, in part, as follows:

In a coaching session February 9, we discussed your attendance and how your absence would effect [sic] your record. You expressed concern and stated you were trying to improve.

Northwest Airlines relies on you as an employee to have reliable and dependable attendance. It is your responsibility to be on time to work each and every day you are scheduled. Because your attendance record has demonstrated disregard for this standard, you are expected to provide a physician's statement for every accountable absence. In addition, no tardies (including on-time punches) will be permitted.

Your continued employment with Northwest Airlines depends upon your demonstrating improved attendance reliability.

Exhibit 28.

16. Compliance with the Company's attendance standards is mandated by NWA's "Rules Of Conduct For Employees Of Northwest Airlines" (hereinafter referred to as the "Rules of Conduct"). Exhibit 21. The Rules of Conduct also require employees to cooperate fully with the Company in any investigation of the employee's conduct and requires honesty and truthfulness in all aspects of the employer-employee relationship. Rules 9 and 10, Exhibit 21 at 3. The Rules of Conduct require employees to attend to their work, carry out their work assignments, and prohibit employees from leaving early without the express permission of his or her manager. Rule 23, Exhibit 21 at 8. The Rules of Conduct also prohibit the use of abusive language or interfering or disturbing others as they perform their job. Rules 12 and 24, Exhibit 21 at 4 and 8, respectively. Certain violations of the Rules of Conduct are grounds for immediate discharge. They include, for example, theft, alcohol and drugs, dishonesty, fighting, falsification of records, failure to cooperate or lying in a company investigation, threatening, intimidating or interfering with other employees. Rule 1, Exhibit 21 at 2.

17. Approximately one month after receiving the Level Two Reminder, Mr. Howard engaged in a belligerent confrontation with his co-workers at a NWA service counter. The incident arose out of Mr. Howard's desire to send a letter to a relative using NWA's package delivery service. Mr. Howard delivered an envelope to NWA Customer Service Agent Dave Sjogren, who assisted Mr. Howard by preparing a box for the envelope. After the envelope was packaged, Mr. Howard volunteered to delivery the package directly to the plane even though that was not his job and another employee had that responsibility. Because he believed that it was out of the ordinary for an employee to volunteer to take the package to the plane and because of his concern that he had not fulfilled his obligation to inspect the envelope to ensure it was a proper shipment, Mr. Sjogren had Mr. Howard's package retrieved from the plane. He opened the package, visually inspected the envelope and place the envelope back in the package and had the package returned to the plane. Tr. Vol. VI at 917. In the meantime, Mr. Howard had reconsidered sending the package to his relative. Because his relative was going to have some difficulty arranging transportation to the airport, Mr. Howard's relative had suggested that the package be mailed. He returned to the airplane to retrieve his package, but discovered that he could not find it. Tr. Vol. I at 94. Mr. Howard returned to speak with Dave Sjogren at the customer service counter. When Mr. Howard returned, he initially could not find Dave Sjogren. Ultimately, he confronted Dave Sjogren; he angrily demanded to know where his package was. When he was not satisfied with Dave Sjogren's explanation, he began shouting and using profane language. Tr. Vol. VI at 922. The shouting and profane language could easily be heard by other persons or customers near the customer service counter. Other Customer Service Agents heard Mr. Howard and summoned a supervisor, Barbara Patrick, to the scene. When Ms. Patrick arrived at the scene, Mr. Howard continued to use profanity and continued to shout so loudly that customers could readily hear and observe the scene. Tr. Vol. VI at 895.

18. Mr. Howard's package had been returned to the plane and was shipped to his relative. His relative received the package.

19. After the incident at the Customer Service Counter, NWA's Manager of Customer Service, Mark Horvath, conducted an investigation, interviewing Mr. Howard and other NWA employees present during the incident. Six employees were interviewed, including Leonard Howard. Five of the employees had similar recollections of the incident, including, for example, answering similarly the questions whether Leonard Howard used profane language and whether customers could have heard or viewed the confrontation. All five employees indicated that Leonard Howard used profane language and that the confrontation could have been heard or seen by customers. On the other hand, Mr. Howard responded to the question about whether he used profane language in the following manner: "Not to my knowledge". "I might have sworn, but I don't recall". "I don't think I swore." Exhibit 56. After comparing Leonard Howard's recollection of the incident at the Customer Service Counter to that of the other five employees, Mr. Horvath concluded that Leonard Howard had not responded honestly to the questions and, by not doing so, failed to cooperate in a Company investigation.

20. After the investigation, Mr. Horvath determined that Mr. Howard had violated NWA's Rules of Conduct for employees, including Rule 12 relating to abusive language, Rule 24 relating to disturbing others, Rule 9 relating to honesty and Rule 10 relating to cooperation

with the Company. For violation of these rules, Mr. Howard was given a Decision Making Leave day to consider the importance of his continued employment with the Company. The Notice of Decision Making Leave stated, in part, as follows:

The rule infractions listed above are serious offenses. These acts of misconduct are unacceptable and even if committed for the first time, are so serious that each offense justifies disciplinary action.

You are being given this Decision Making Leave as a final opportunity to commit to change your behavior and to meet Company performance expectations in all categories of safety, conduct, attendance and work performance. Your failure to do so may result in your termination.

Exhibit 10.

21. On December 1, 1993, Mr. Howard was scheduled to transfer certain luggage from Flight No. 53 to a connecting flight. Mr. Howard failed to meet the flight on time; he arrived late just as his co-workers were in the process of taking the luggage to various connecting flights. Tr. Vol. 4 at 662. Certain bags from Flight 53 did not reach their connecting flights, prompting Mr. Howard's supervisor, Kathy Wallace, to investigate what happened to the bags. In the process of Kathy Wallace's investigation, she questioned Mr. Howard. He informed her that he did not handle the bags from Flight 53 and that he and another ESE, Rick Chamberlain, had a deal whereby Mr. Chamberlain would cover the flight for him. Tr. Vol. I at 144. Ms. Wallace next spoke with Rick Chamberlain who denied that he and Mr. Howard had a deal with respect to transferring the bags on Flight No. 53. Tr. Vol. IV at 653; Vol. V at 785.

22. The following night, on December 2, 1993, Ms. Wallace continued her investigation into the Flight 53 matter. At approximately 9:00 p.m., Ms. Wallace went to the transfer area to speak with Mr. Howard. She discovered that Mr. Howard had left work early. She also discovered upon speaking with one of the ESE chiefs for the evening, Len Perry, that Mr. Howard had not been given permission to leave early. Tr. Vol. V at 790-91.

23. Ms. Wallace spoke with Mr. Howard several days later on December 6, at which time she confronted Mr. Howard with the denial by Mr. Chamberlain that he was aware of a deal connected with the baggage on Flight 53. During this discussion, Mr. Howard gave Ms. Wallace a different reason why he was late for Flight 53. He claimed that he had difficulties with his transfer tug and that he had gone to a maintenance building to have his tug repaired. Mr. Howard also informed her that he had been given permission to leave early on December 1. Ms. Wallace conducted a question-and-answer interview of Mr. Chamberlain and Mr. Perry. Mr. Chamberlain denied that he had a deal with Mr. Howard. Mr. Perry again denied that he had given Mr. Howard permission to leave early and that, in any event, Mr. Howard knew that instead of Mr. Perry another chief assigned to Mr. Howard had that responsibility. Tr. Vol. III at 563, 566-69.

24. After her investigation of the events on December 1 (the failure to meet Flight 53 on a timely basis) and December 2 (early leave without permission), Ms. Wallace

determined that Mr. Howard had been "dishonest, misleading and untruthful" during the Company investigation. In a memo dated December 14, 1993, she terminated Mr. Howard for violating NWA's Rules of Conduct, Rule 23 concerning attention to work, Rule 09 concerning honesty and Rule 10 relating to cooperation with Company.

25. Leonard Howard failed to identify any white NWA employees who were similarly situated to him as an employee of NWA.

26. Leonard Howard made numerous misstatements of fact. First, in his charge of discrimination filed with the Minnesota Human Rights Department, he states, in part, as follows:

I was terminated after being accused of misconduct in rather minor incidents, one of which involved a temporary absence because my daughter had been kidnapped.

This record establishes that even though Mr. Howard had attendance problems and was being disciplined for those attendance problems, he was not disciplined for the five days he was absent in August of 1993 to deal with the abduction of his daughter. The statement that one of the reasons he was terminated was due to these absences is false. Mr. Howard was given reasons in writing for his termination. He knew or should have known that his five-day absence in August of 1993 played no part in his termination.

27. Another false statement made by Mr. Howard related to employee problems he claims to have experienced at NWA. He claimed to have had no work-related problems at other NWA locations where he was employed and that his problems did not begin until he was relocated to the Minneapolis-St. Paul International Airport. The record establishes, however, that Mr. Howard experienced problems while working for NWA at the Kansas City International Airport. Leonard Howard had a collision with an aircraft that resulted in disciplinary action and was coached regarding his attendance while employed there. Similarly, Leonard Howard denied that he had issues relating to his employment with a company called Thermotech. Tr. Vol. II at 219-33. However, the record establishes that Mr. Howard had both an attendance problem while at Thermotech and problems related to his behavior that required his supervisor to review employment policies with him. The record of this proceeding contains several other misstatements of fact that suggest Leonard Howard is not a credible witness.

Based on 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 14.50 (1994).

2. The Notice of and Order for Hearing was proper as to form, content, and execution, and all other relevant substantive and procedural requirements of law and rule have been satisfied.

3. Respondent Northwest Airlines is an "employer" within the meaning of Minn. Stat. § 363.01, subd. 17 (1994). Complainant, Leonard Howard, was an "employee" within the meaning of Minn. Stat. § 363.01, subd. 16 (1994).

4. The Minnesota Human Rights Act prohibits covered employers from discharging or discriminating against an employee with respect to terms, conditions, or privileges of employment because of race, except when based on a bona fide occupational qualification. Minn. Stat. § 363.03, subd. 1(2) (1994).

5. The U.S. Supreme Court first set forth a framework for the analysis of Title VII discrimination charges based on race in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under McDonnell Douglas and its progeny, 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 Respondent in each of the consolidated cases involved here, who must articulate legitimate, nondiscriminatory reasons for the actions alleged to be discriminatory. If the Respondents articulate legitimate, nondiscriminatory reasons for their actions, the Complainant may present evidence showing that the reasons articulated are a mere pretext for discrimination or are otherwise unworthy of belief. The McDonnell Douglas analytic framework must be followed in cases arising under the Minnesota Human Rights Act as well. See, e.g., Sigurdson v. Isanti County, 386 N.W.2d 715, 719-20 (Minn. 1986).

6. The burden of proof in an action involving violations of the Minnesota Human Rights Act remains, at all times, with the Complainant, who must establish by a preponderance of the evidence that the Respondents engaged in unlawful discrimination. Sigurdson, 386 N.W.2d at 720 n. 12.

7. The Complainant failed to make a prima facie showing that Northwest Airlines discriminated against him on the basis of his race in his discharge, or in other terms, privileges, or conditions of his employment.

8. Under Minn. Stat. § 363.03, subd. 7(1), it is an unfair discriminatory practice for an employer to intentionally engage in a reprisal against a person opposing unfair discriminatory practices under the Minnesota Human Rights Act. The Complainant has failed to make a prima facie showing that Northwest Airlines retaliated against him because he opposed a practice forbidden by the Human Riughts Act.

9. These Conclusions are made for the reasons set forth in the Memorandum which follows. The Memorandum is incorporated herein by reference.

Based on the foregoing Conclusions, IT IS HEREBY ORDERED:

ORDER

The charges of discrimination filed by Complainant Leonard Howard with the Minnesota Department of Human Rights against Northwest Airlines, Inc., should be and they are hereby DISMISSED with prejudice.

Dated this _____ day of July, 1996.

Allen E. Giles
Administrative Law Judge

Reported: Court Reported. Transcript Prepared By Shaddix & Associates, Suite 181,
9100 West Bloomington Freeway, Bloomington, Minnesota 55431

MEMORANDUM

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

The approach set forth in McDonnell Douglas consists of a three-part analysis which first requires the Complainant to establish a prima facie case of disparate treatment based upon a statutorily-prohibited discriminatory factor. Once a prima facie case is established, a presumption arises that the Respondent unlawfully discriminated against the Complainant. The burden of producing evidence then shifts to the Respondent, who is required to articulate a legitimate, nondiscriminatory reason for its treatment of the Complainant. The Respondent's burden is light at this stage; it is not required to prove that it was actually motivated by the reason offered. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). The issue is whether there is evidence that the Respondent's actions were related to a legitimate business purpose. Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978). If the Respondent demonstrates a legitimate, nondiscriminatory reason, the burden of production shifts back to the Complainant to demonstrate that the Respondent's claimed reasons are a mere pretext for discrimination. Id.; McDonnell Douglas, 411 U.S. at 803; Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619, 623 (Minn. 1989); Hubbard v. United Press International, Inc., 330 N.W.2d 428 (Minn. 1983). The Complainant may sustain this burden either directly, by persuading the fact-finder that a discriminatory reason more

likely motivated the employer, or indirectly, by showing that the explanation proffered by the employer is unworthy of credence. Sigurdson, 386 N.W.2d at 720; Miller v. Centennial State Bank, 472 N.W.2d 349, 354 (Minn. Ct. App. 1991). Indirect proof of discrimination is permissible to show pretext, since “an employer’s submission of a discredited explanation for firing a member of the protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred.” Haglof v. Northwest Rehabilitation, Inc., 910 F.2d 492, 494 (8th Cir. 1990), quoting MacDissi v. Valmont Industries, Inc., 856 F.2d 1054, 1059 (8th Cir. 1988). The burden of proof remains at all times with the Complainant, who bears the ultimate burden of persuading the fact-finder by a preponderance of the evidence that the Respondent intentionally discriminated against him. Sigurdson, 386 N.W.2d at 720; Fisher Nut Co. v. Lewis ex rel. Garcia, 320 N.W.2d 731 (Minn. 1982); Lamb v. Village of Bagley, 310 N.W.2d 509, 510 (Minn. 1981).

The elements of a prima facie case of discrimination vary depending upon the type of discrimination alleged. A prima facie case of race discrimination in terms, conditions, and privileges of employment is established by showing that:

- (1) The employee is a member of a protected class;
- (2) The employee was qualified and employed by the employer; and
- (3) The employee was treated unfairly in his terms, conditions, and privileges of employment compared to similarly-situated non-minority employees.

It is necessary to establish the following elements to demonstrate a prima facie case of race discrimination in discharge under the Minnesota Human Rights Act:

- (1) The employee is a member of a protected class;
- (2) The employee was qualified for the position held;
- (3) The employee was discharged; and
- (4) After the employee’s discharge, the employer assigned a non-member of the protected class to do the same work.

Rademacher v. FMC Corporation, 431 N.W.2d 879, 882 (Minn. App. 1988). Accord (under Title VII) Whiting v. Jackson State University, 616 F.2d 116, 121 (5th Cir. 1980); Flowers v. Crouch Walker Corp., 552 F.2d 1277 (7th Cir. 1977); cf. Osborne v. Cleland, 620 F.2d 195, 197-98 (8th Cir. 1980) (requiring as the fourth element that the employee show that the employer sought people with the employee's qualifications to fill his former job).

Based on the facts in this case, Mr. Howard has failed to establish the prima facie case of race discrimination in terms, conditions and privileges of employment. While it is unchallenged that Leonard Howard is a member of a protected class and was qualified and employed by NWA, Mr. Howard has failed to identify a similarly situated non-minority employee for which a comparison might be made. For this reason, Mr. Howard has failed to make a prima facie case of race discrimination in terms and conditions of employment. Similarly, Leonard Howard has failed to establish a prima facie case of race discrimination in connection with his discharge by NWA. While it is unchallenged that Mr. Howard has met the first three elements: that he is a member of a protected class, that he was qualified for the position held, and that he was discharged, no effort has been made in this record to establish that after Leonard Howard's discharge from NWA, NWA assigned a non-protected class person to do the same work. Therefore, Mr. Howard has failed to establish a prima facie case of race discrimination in his discharge.

Mr. Howard also claims that NWA's management took reprisal against him in violation of Minn. Stat. § 363.03, subd. 7 in connection with the incident at the NWA service counter. Mr. Howard claims that his race was the reason Mr. Sjogren had his package removed from the plane. He further asserts that because of this racially discriminatory treatment he was provoked into the confrontation with Dave Sjogren. Subdivision 7 provides in relevant part as follows:

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

(1) opposed a practice forbidden under this chapter . . .

A reprisal includes, but is not limited to, any form of intimidation, retaliation, or harassment. It is a reprisal for an employer to do any of the following with respect to an individual because that individual has engaged in activities listed in clause (1) or (2): refused to hire the individual; depart from any customary employment practice; transfer or assign the individual to a lesser position in terms of wages, hours, job classification, job security, or other employment status . . .

The McDonnell Douglas burden-shifting scheme for analyzing discrimination claims applies to claims of reprisal or retaliation. Hubbard v. United Press Intern. Inc., 330 N.W.2d 428, 444 (Minn. 1983). Ms. Schelin has the initial burden of establishing a

prima facie case of reprisal or retaliatory discharge. To establish a prima facie case of retaliation, an employee must establish:

- (1) statutorily-protected conduct by the employee;
- (2) adverse employment action by the employer; and
- (3) a causal connection between the two.

Lenord Howard has failed to establish a prima facie case of reprisal. This record does not contain any support for the claim that his race had anything to do with Mr. Sjogren's actions. Therefore Mr. Howard is unable to establish that he engaged in "statutorily-protected conduct."

AEG