IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

WILLIAM C. EDMUND, Plaintiff, vs. MIDAMERICAN ENERGY CO., MIDAMERICAN ENERGY HOLDING CO. and JACK ALEXANDER, Defendants.	)	Civil No. 4-00-cv-30217 RULING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter is before the Court following hearing on defendants' motion for summary judgment (#9). Plaintiff asserts claims under the Iowa Civil Rights Act, Iowa Code Ch. 216 (ICRA), and Title VII, 42 U.S.C. § 2000e, et seq. Jurisdiction is predicated on 28 U.S.C. §§ 1331, 1343(a)(4) and 42 U.S.C. § 2000e(f)(3). The parties consented to proceed before a United States Magistrate Judge and the case was referred to the undersigned for all further proceedings on March 20, 2001. See 28 U.S.C. § 636(c).

Plaintiff alleges he was subjected to reverse gender discrimination by his employer MidAmerican Energy Co. when he was demoted from his position as Manager of Compensation to Senior Compensation Analyst and, not long after, when he was not promoted to the position of Vice President of Compensation, Benefits and Human Resources Information Services. His claims against the corporate defendants (collectively referred to as "MidAmerican")

are under Title VII and ICRA. He sues his former supervisor Jack Alexander under ICRA only. See Vivian v. Madison, 601 N.W.2d 872, 878 (Iowa 1999).

I.

A party is entitled to summary judgment only when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Helm Financial Corp. v. MNVA Railroad, Inc., 212 F.3d 1076, 1080 (8th Cir. 2000)(citing Fed. R. Civ. P. 56(c)); accord Bailey v. USPS, 208 F.3d 652, 654 (8th Cir. 2000). An issue of material fact is genuine if it has a real basis in the record. Hartnagel v. Norman, 953 F.2d 394, 395 (8th Cir. 1992) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986)). A genuine issue of fact is material if it "might affect the outcome of the suit under governing law." Hartnagel, 953 F. 2d at 395 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)); see Rouse v. Benson, 193 F.3d 936, 939 (8th Cir. 1999).

In assessing a motion for summary judgment a court must determine whether a fair-minded trier of fact could reasonably find for the nonmoving party based on the evidence presented. Anderson, 477 U.S. at 248; Herring v. Canada Life Assurance Co., 207 F.3d

1026, 1030 (8th Cir. 2000). The court must view the facts in the light most favorable to the nonmoving party, and give that party the benefit of all reasonable inferences which can be drawn from them, "that is, those inferences which may be drawn without resorting to speculation." Mathes v. Furniture Brands Int'l, Inc., __ F.3d ___,___, No. 00-3811, slip op. at 2 (8th Cir. Sept. 21, 2001)(citing Sprenger v. Federal Home Loan Bank of Des Moines, 253 F.3d 1106, 1110 (8th Cir. 2001)); see Matsushita, 475 U.S. at 587; Lambert v. City of Dumas, 187 F.3d 931, 934 (8th Cir. 1999); Kopp v. Samaritan Health System, Inc., 13 F.3d 264, 269 (8th Cir. 1993).

Employment discrimination cases examine the employer's motivation for a particular employment action. Proof of motivation "often depend[s] on inferences rather than on direct evidence." Mems v. City of St. Paul, 224 F.3d 735, 738 (8th Cir. 2000)(citing Crawford v. Runyon, 37 F.3d 1338, 1341 (8th Cir. 1994)). See also Cravens v. Blue Cross and Blue Shield of Kansas City, 214 F.3d 1011, 1016 (8th Cir. 2000); Bell v. Conopco, Inc., 186 F.3d 1099, 1101 (8th Cir. 1999). For this reason, care must be taken in considering a motion for summary judgment in an employment case to allow plaintiff the benefit of every reasonable inference of motivation or intent which might be taken from the evidence.

II.

Plaintiff William C. Edmund, a male, began his career with Iowa-Illinois Gas & Electric Company in 1963. Except for a two-year hiatus in 1967-68 while serving in the U.S. Army, he was employed continuously thereafter by Iowa-Illinois and its successors. Iowa-Illinois became part of the survivor entity, MidAmerican Energy Co., following a merger in 1995. In July 1995 plaintiff was selected for the position of Manager of Compensation within the Human Resources Department. He officed in Des Moines. At that time his immediate supervisor was a male, David Levy, Vice President of Human Resources and Information Technology.

In May 1996 Jack Alexander became Manager of Human Resources. At the time there were ten men and twenty-nine women within the department. Alexander's title changed to Vice President of Human Resources on November 11, 1996. In both capacities he had supervisory responsibility over the employees within the Human Resources Department including Mr. Edmund. Mr. Alexander's supervisory responsibility over the Human Resources Department ended on November 1, 1998 when he was promoted to Senior Vice President of Energy Delivery.

When Alexander began his tenure in the Human Resources Department, his predecessor, David Levy, discussed various employees with him, including the plaintiff. Levy reportedly told

Alexander "that if he wanted compensation to go in a new direction, Bill Edmund would not be the best person to lead those changes." (Levy Aff. at 3).

In support of its reasons for demoting Edmund MidAmerican spotlights a number of complaints senior management and other employees voiced about Edmund's job performance. Edmund does not identify evidence to dispute that the complaints were made or their substance. He does, however, very much dispute their validity. He believes Alexander failed to support him and undermined him thus contributing to the unfavorable impression which MidAmerican says was the reason for the employment actions in question.

According to Alexander, in about May 1996 Phil Lindner, Alexander's male supervisor, complained to Alexander about Edmund's resistance to a corporate decision to discontinue energy efficiency loans to the former employees of Iowa-Illinois who had become employees of MidAmerican Energy as a result of a 1995 merger. (Alexander Depo. at 62-63). Lindner apparently provided Alexander copies of memos illustrating his frustration with Edmund. (Id. at 299-301). Alexander has also testified that at about the same time he received several complaints that plaintiff overused e-mail as a form of communication. (Id. at 64-65, 77, 278-79). To Edmund these are examples of how Alexander failed to support him and he notes

Alexander never raised these problems with him until May 1998, two years later. (Pl. Response to Def. Stat. of Undisputed Facts at 2).

In 1997 Jodi Stephens, a female Payroll Supervisor who reported to Edmund, complained to Alexander that Edmund did not understand "what was going on" in payroll. (Alexander Depo. at 69-70, 278). Stephens' successor, Michelle Book, complained to Alexander that Edmund was not accessible, overused e-mail and failed to provide strategy for the Payroll Department. (Id. at 97-98). Edmund responds that he was accessible through his open-door policy and Alexander had indicated to him that daily attention to the details of payroll was not necessary on Edmund's part.

In 1997-98 John Cappello, a male Senior Vice President for Marketing and Sales, told Alexander that Edmund was not understanding what Cappello wanted in a new compensation and salary structure for the marketing and sales group. Cappello ultimately hired an outside consultant to assist in developing the plan because of his frustration with Edmund. (Alexander Depo. at 75-76, 80). Cappello had not provided Edmund with the information he required to develop the requested compensation and salary structure. When Cappello complained to Alexander about Edmund's lack of cooperation, Alexander did not raise the issue with him (Edmund) or explain to Cappello the need for the information. (Edmund Aff. at 1-2).

At Alexander's request, the same outside consultant, David Camner, provided a written memo regarding Camner's assessment of Edmund's abilities. (Alexander Depo. at 293-97). Noting that his assessment was "anecdotal information based on insufficient information and may not be accurate," Camner opined that Edmund had "good analytical skills but [was] less effective at understanding the 'big picture.'" (Def. Ex. 2 at 1). Edmund, wrote Camner, was "probably a sound senior compensation analyst at a time when the company needs a particularly creative challenger to the status quo." (Id. at 2). Alexander recognized that there was friction between Camner and Edmund while Camner was performing his consulting activities and did not show Camner's report to Edmund. (Alexander Depo. at 83-86).

Alexander also received a verbal complaint from Senior Vice President and General Counsel John Rasmussen, who, together with other senior officers of MidAmerican, wanted a particular male senior attorney's position upgraded. Alexander was told Edmund was resistant to making the change. Alexander believed Edmund was being too rigid and inflexible with respect to the issue. (Id. at 131-135; Rasmussen Aff. at 2). Edmund felt the upgrade was contrary to company policy and inappropriate because another, female attorney with greater supervisory responsibility would then be in a lower pay grade. (Edmund Aff. at 3).

Alexander also received complaints from Russ White, Manager of General Services, and Alan Wells, Senior Vice President for Finance and Chief Financial Officer. Both men were upset with Edmund's resistance to their attempts to upgrade certain employees. Mr. Wells complained to Alexander that Edmund was a "roadblock" and always gave negative feedback rather than constructive solutions to issues. (Alexander Depo. at 136). David Levy, in his capacity as Senior Vice President for Technology and Customer Service, and Ron Stepien, MidAmerican's President, voiced similar concerns to Alexander. Stepien told Alexander he did not want to meet with Edmund any longer regarding compensation issues as he viewed Edmund was overly technical and not addressing solutions to problems. (Id. at 139-152; Stepien Aff. at 2). Mr. Edmund disputes these characterizations and faults Alexander for consistently failing to support his position. (Edmund Aff. at 1-3).

Sue Rozema, Vice President of Financial Services, called Alexander about Edmund's participation in a committee overseen by Rozema. Edmund had attended a committee meeting and was, according to Rozema, obstructionist and negative. Rozema asked that he be replaced. (Alexander Depo. at 324-25). Mr. Edmund says he was concerned with the direction Rozema's committee was taking and again complains of Alexander's lack of support. (Edmund Supp. Aff. at 2).

In 1998, before Alexander left the Human Resources Department, Edmund performed an analysis of compensation within the Human Resources Department for the purpose of making salary recommendations. Charles R. Snider, one of Edmund's subordinates, complained to Alexander that Edmund recommended only two positions for an upgrade, one of which was Edmund's. Snider told Alexander he thought the report was biased. (Snider Depo. at 6-9, 37-38, 47-48).

In 1998 Mr. Rasmussen, MidAmerican's General Counsel, told Alexander that company president Stepien had concluded they did not want Edmund to be the company's witness before the Iowa Utilities Board with respect to a requested rate increase, as they did not believe Edmund could persuasively and credibly articulate the company's position. (Alexander Depo. at 239-241).Edmund notes that on other occasions the company used him as a witness and to communicate with a legislator concerning a regulatory issue. (Edmund Aff. at 5).

Mr. Alexander did not conduct any performance reviews for human resources employees until the Spring of 1998 (Alexander Depo. at 73-74). At that time Alexander did a written "Leadership Skills Assessment" of Edmund as well as Maureen Sammon, Manager of Employee Benefits. (Def. App., Ex A; Pl. App., Ex. E). Edmund's evaluation was not very good. He was rated "mixed performance" in most categories, but "development needed" in several others.

Alexander criticized him as "resistant to change," not "proactive" and lacking in leadership skills. (Def. App., Ex. A). Alexander reviewed the written leadership evaluation with Edmund. Edmund did not agree with any of the criticisms. He believed the evaluation was a personal attack by Alexander and that the various shortcomings should have been raised with him previously rather than all at once in the evaluation. (Edmund Depo. at 292-296).

On November 1, 1998 Keith Hartje, a male, took over from Alexander as Vice President of Human Resources and Edmund's supervisor. A merger between MidAmerican and CalEnergy Company was to occur in the first quarter of 1999. Hartje testified he became dissatisfied with Edmund's progress in helping bring the compensation systems for the two companies together. Edmund had not given him a plan or a time frame for implementation. (Hartje Depo. at 145-148). Edmund denies that Hartje ever communicated any deadline or timetable requirements to him and notes Hartje's deposition testimony does not indicate that Hartje's expectations were ever clearly communicated to him.

In December 1998 a committee was formed to develop the compensation and benefits system for the new entity. Hartje appointed Maureen Sammon as head of that committee. (Hartje Depo. at 710). Edmund was not placed on the committee. (Edmund Depo. at 335-37).

On January 28, 1999, Hartje made a written evaluation of Edmund's performance. (Def. App., Ex. C). The evaluation concluded: "Effective with the merger date, Bill's position within the compensation group will change. He will move from the position of manager of compensation, to a position of senior analyst. This will make the most of Bill's strengths." (Id.) Hartje wrote that these strengths were technical and analytical in nature. (Id.) Hartje believed Edmund was perceived as reactive, resistant to change and without "strategic thinking" skills. For this reason company officers were reluctant to work with him. (Id.)

At the same time the decision was made to demote Edmund it was decided to replace him with Duke Vair, a CalEnergy male employee. (Hartje Depo. at 48-49). Hartje testified he had concluded Edmund was not the right person to head compensation in the new post-merger organization based on his appraisal of Edmund's performance and the concerns expressed to him by other senior members of MidAmerican's management. He believed Vair was the more appropriate person for the job and that Edmund's skills would be best used as a Senior Compensation Analyst. (Id. at 48-50).

It is not completely clear in the summary judgment record, but it appears Edmund was advised of Hartje's plans at about the time of the January 28 evaluation. A week or ten days before Edmund was advised of the demotion, Hartje told Alexander of

his decision. Hartje testified he did not ask Alexander's permission or advice and that he made the decision on his own, not at the request of or due to the influence of Alexander. (Hartje Depo. at 86-87).

In early February 1999 the responsibility for the company's payroll function was removed from Edmund's general supervision. Hartje testified he gave Jodi Bacon, a female, responsibility for payroll because she had been involved in converting the payroll system to a new "Cyborg" computer software system. (Hartje Depo. at 138-140; Bacon Depo. at 5-13). Edmund contends this reason was pretextual because Bacon had no prior experience with payroll whereas he had considerable experience. (Hartje Depo at 140; Bacon Depo. at 5).

Effective March 12, 1999, when MidAmerican and CalEnergy merged, Edmund was demoted to Senior Compensation Analyst and was replaced by Vair as Manager of Compensation. Vair left the company after about a month and a half in May 1999. (Vair Depo. at 41). Edmund's salary was not decreased as a result of the demotion, but the demotion affected his ability to obtain salary increases.

Edmund believes Alexander made the decision to demote him as far back as October 1998 and had communicated this information to Sally Stetson, a recruiter with the job search firm of Salveson-

Stetson, (Stetson Depo. at 9-10) as well as to Ed Bazemore and Vair, both of whom were then with CalEnergy. (Vair Depo. at 21-25).

Also on March 12, 1999, Maureen Sammon was appointed by Hartje as Manager of Shared Information Services, followed shortly thereafter, on April 27, 1999, by promotion to Vice President of Compensation, Benefits and Human Resources Information Services. When Vair left Sammon took over his compensation management responsibilities. (Hartje Depo. at 129-30). Edmund was not considered for the job. (Id.)

Edmund contends Alexander's hiring, firing, promotion and demotion decisions evince bias in favor of female employees. The statistical information is given a closer look in the next section, but according to Edmund during his tenure in Human Resources Alexander (1) hired five female employees and one male and initially wanted to hire a female for the job given to the male, (2) promoted six female employees, and (3) demoted four male employees, terminated two others and three males quit. Alexander hired a woman as Manager of Learning Systems from a candidate field of six men and four women. Among six candidates, three men and three women, Alexander chose two women for the position of "Business Partner." When he began two women and four men reported to Alexander. When he left five women and two men reported to him. (Pl. Stat. of Facts at 2-3).

Mr. Edmund also relies on the testimony of Duke Vair that Alexander had a preference for hiring females and an affinity for women with large breasts. (Vair Depo. at 45-48).

Other than Alexander, there is no evidence or contention that any MidAmerican decision maker was biased in favor of women in the workplace or against men.

III.

The targeted adverse employment actions are Mr. Edmund's demotion from Manager of Compensation and the promotion of Maureen Sammon over Edmund to the position of Vice President of Compensation, Benefits and Human Resources Information Services. There is no direct evidence of discriminatory intent, hence, as the parties appear to agree, this case is analyzed under the familiar three-step analytical framework articulated by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). Plaintiff first has the burden of establishing a prima facie case which creates "a legal presumption of unlawful discrimination." This in turn shifts the burden to defendants to articulate "a legitimate, nondiscriminatory reason" for the employment action at issue. Bogren v. Minnesota, 236 F.3d 399, 404 (8th Cir. 2001), ***petition for cert. filed***, 69 U.S.L.W. 3750 (May 16, 2001)(No. 00-1729); O'Sullivan v. Minnesota, 191 F.3d 965, 969 (8th Cir. 1999)(citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506

(1993)). Plaintiff must then produce sufficient evidence from which the fact finder could conclude that defendants' reason is not the true reason but a pretext for discrimination. O'Sullivan, 191 F.3d at 969. Claims under ICRA are analyzed in essentially the same fashion. Vivian, 601 N.W.2d at 873; Hamer v. Iowa Civil Rights Commission, 472 N.W.2d 259, 263-64 (Iowa 1991); Hy-Vee Food Stores v. Civil Rights Commission, 453 N.W.2d 512, 516 (Iowa 1990).

Prima Facie Elements

The elements of a prima facie case vary somewhat with the type of adverse employment action involved. In the case of a demotion or discharge, the first three elements are well established: (1) plaintiff is a member of a protected group; "(2) he was performing his job at a level that met his employer's legitimate expectations; (3) he was demoted . . . ." Fisher v. Pharmacia & Upjohn, 225 F.3d 915, 919 (8th Cir. 2000); Berg v. Bruce, 112 F.3d 322, 327 (8th Cir. 1997); see Hicks v. St. Mary's Honor Ctr., 970 F.2d 487, 491 n.7 (8th Cir. 1992). The fourth element is a flexible one. The discharge or demotion must have "occurred under circumstances that create an inference of unlawful discrimination." Rorie v. United Parcel Serv. Inc., 151 F.3d 757, 760 (8th Cir. 1998); see O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308, 312 (1996) (citing Teamsters v. United States, 431 U.S. 324, 358 (1977)); Walker v. St. Anthony's Medical Center,

881 F.2d 554, 558 (8th Cir. 1989). Traditionally, this has been satisfied by evidence that plaintiff was replaced by a person of the opposite gender in a gender discrimination case, or the employer sought a similarly qualified candidate after the discharge or demotion. See Fisher, 225 F.3d at 919; Hindman v. Transkrit Corp., 145 F.3d 986, 992 (8th Cir. 1998); Berg, 112 F.3d at 327; Hicks, 970 F.2d at 491; Osborne v. Cleland, 620 F.2d 195, 197-98 (8th Cir. 1980); 1 Larson, Employment Discrimination § 8.08[2] at 8-119 (2d Ed.)(hereinafter "Larson"). But these means are not exclusive, the specific facts of the case have to be examined to determine if an inference of discrimination is sufficiently shown. Hindman, 145 F.3d at 992.

Where the adverse employment action is a failure to promote, the prima facie elements plaintiff must demonstrate are, in the case of a male plaintiff:

> (1) That [he] is a member of a protected class;
> (2) That [he] applied and was qualified for a job for which the employer was seeking applicants;
> (3) That [he] was rejected; and
> (4) That after rejecting plaintiff the employer continued to seek applicants with plaintiff's qualifications . . . . Under Title VII [he] must show that the employer hired a [woman] for the position . . . .

Duffy v. Wolle, 123 F.3d 1026, 1036 (8th Cir. 1997), cert. denied, 523 U.S. 1137 (1998) (quoting Krenik v. County of Le Sueur, 47 F.3d

953, 957-58 (8th Cir. 1995) (quotations and citation omitted)); see Cardenas v. AT&T Corp., 245 F.3d 994, 998 (8th Cir. 2001).

The prima facie equation is altered somewhat in a reverse discrimination case. The first element, membership in a protected group or class, is not germane. However, a reverse discrimination plaintiff typically must show something extra. The evidence must reveal "background circumstances [which] support the suspicion that the defendant is that unusual employer who discriminates against the majority." Duffy, 123 F.3d at 1036 (quoting Murray v. Thistledown Racing Club, Inc., 770 F.2d 63, 67 (6th Cir. 1985)). This is not a very definitive standard, but its purpose is to require evidence which explains why, in this case, a male supervisor (Alexander), would discriminate against another male on the basis of gender. See Bishopp v. District of Columbia, 788 F.2d 781, 786 (D.C. Cir. 1986). "Background circumstances" is not a distinct and indispensable element of a reverse discrimination prima facie case if there is nonetheless sufficient evidence of discrimination. Duffy, 123 F.3d at 1036 (quoting Notari v. Denver Water Dep't, 971 F.2d 585, 590 (10th Cir. 1992)).

While most discussions of the sufficiency of the evidence in an employment discrimination case begin with the prime facie stage, here it is appropriate to start at the evidential core of plaintiff's claims -- Alexander's bias -- because it is the

foundation of both the prima facie and pretext components of McDonnell Douglas analysis.

Alexander's Role and the Evidence of Gender Bias

The lynchpin of plaintiff's case is Alexander's alleged bias in favor of female employees. There is no evidence that anyone else involved in the demotion and promotion decisions was motivated by gender. Edmund's theory is that Alexander made or substantially influenced the decision to demote him, and though he left the department, infected his replacement Hartje's decisions by providing biased information and opinions about Edmund's job performance.[1] This, coupled with Alexander's failure to support him when others made complaints about positions Edmund had taken, created a poor impression of Edmund's performance among MidAmerican's senior management. Alexander's gender bias motivated him throughout.

There is some evidence in the record to support Edmund's belief that the idea of replacing him with Mr. Vair originated with

[1] Edmund thus relies in part on a "cat's paw" theory. Courts, applying agency and causation principles, have recognized Title VII liability where a person who is not the actual decision maker uses the decision maker as a conduit for his bias by, for example, making a recommendation to the decision maker motivated by discriminatory animus. See Stimpson v. City of Tuscaloosa, 186 F.3d 1328, 1331 (11th Cir. 1999); Kramer v. Logan Co. Sch. Dist. No. R-1, 157 F.3d 620, 624 (8th Cir. 1998)(citing Kientzy v. McDonnell Douglas Corp., 990 F.2d 1051, 1060 (8th Cir. 1993)); Shager v. Upjohn Co., 913 F.3d 398, 405 (7th Cir. 1990); Pl. Brief in Resistance at 14-15.

Alexander in the fall of 1998 at the time the CalEnergy merger was in the works and just before Alexander's departure as Human Resources Vice President. According to Vair's testimony, a manager with Vair's then employer, CalEnergy, told him that he would be taking the position of manager of compensation after the merger (Vair Depo. at 21-25). Vair was told that MidAmerican "wanted a stronger presence in compensation" and he understood from the conversation Alexander had voiced that position. (Id.) The testimony of the job recruiter, Sally Stetson, lends support. She has said that in October 1998 she discussed a potential job search for a manager of compensation with Alexander. The idea was aborted early on when Alexander informed her that someone had been identified for the position through the CalEnergy merger. (Stetson Depo. at 9-10). In some respects Vair's testimony may be inadmissible, but in view of Stetson's testimony and the fact that Hartje discussed Alexander's opinion of Edmund's job performance at the time Hartje took over when the future compensation and benefits system in the merged companies was a lively issue, (Hartje Depo. at 32-33, 48), it is fair to infer that Alexander was involved in or influenced the decisions which led to Edmund's demotion.[2]

[2] It is worth noting that Vair's testimony about Alexander's role in the demotion decision is not helpful to Edmund. That Alexander planned to replace Edmund with Vair, another male, because a stronger compensation manager was wanted is not evidence of gender bias and is inconsistent with pretext.

The evidence of Alexander's alleged gender bias is primarily his track record in making employment decisions about male and female employees during his two-and-a-half year tenure as Edmund's supervisor. The statistical evidence on which Edmund relies bears closer examination in light of the largely uncontradicted testimony about the employment decisions. The result helps illustrate why such evidence rarely suffices to establish discriminatory intent in a disparate treatment case.

At the start, women outnumbered men in the department when Alexander took over by about three to one. Edmund states Alexander hired five female employees and one male employee, Paul Priest. According to Edmund, Alexander initially wanted a woman for Priest's job. The evidence is that Alexander was not a primary decision maker in the case of two of the women. Judy Bohrofen was a human resources director at a MidAmerican subsidiary who, when the subsidiary was closed down, came with the rest of the subsidiary's human resources employees to MidAmerican's Human Resources Department. (Alexander Depo. at 194-95). Tama-Lea Bence was hired by Alexander's boss, Phil Linder, as a secretary for Linder and Hartje. Alexander, as well as Hartje, agreed with the decision. (Id. at 200). As to Paul Priest, the Court is not directed to any evidence that Alexander at any time preferred a

female candidate for the position. Alexander denies he did so. (Id. at 150; see Stetson Depo. at 14-16).

Alexander did hire Diana Muscha, Maria Atchison and Julie Sorci; Muscha as Manager of Learning Systems and the latter two as "Business Partners." (Alexander Depo. at 167, 184). These hires were made with the assistance of Stetson's outside search firm, Salveson-Stetson. (Id. at 168; Stetson Depo. at 20-21). A number of MidAmerican management employees were involved in the hiring process while Alexander made the final decision. (Alexander Depo. at 167-70; 184-85). Muscha subsequently resigned, but would have been terminated had she not done so. (Id. at 186).

Edmund states Alexander promoted six[3] female employees. The evidence, however, is that the promotion decision for five of the employees was made by other persons, or on the recommendation of other persons. Jerry Beltramo, a male, recommended the promotion of Melody Justice when Beltramo resigned. (Alexander Depo. at 152-53, 179). Tom Sweeney recommended the promotion of Jan Amick and made the decision to promote Janet Trentmann. (Id. at 180-83). Mr. Edmund's payroll responsibilities were given to Jodi Bacon. The deposition testimony plaintiff relies on indicates the decision was made by Hartje. Alexander denied Bacon was promoted. (Id. at 187-

[3] In his statement of material facts, Edmund refers to six females, but names seven.

91). Steve Shelton promoted Sheila Johnson, Alexander was not involved in the decision. (Id. at 193-94).

Finally, Edmund notes that during Alexander's tenure in Human Resources four male employees were demoted (including Edmund), two were terminated and three resigned. The summary judgment record does not reveal much about the background circumstances and no comparable numbers for women are given. The deposition testimony of Alexander cited to by Edmund indicates that two of the demotions, Tom Sweeney and Robert Moore, were for performance reasons. (Id. at 158-59, 163). Don York was terminated because of two incidents in which he was unprofessional and negative about the company with job applicants. (Id. at 156-57). Of the quits, Jerry Beltramo left to go into private consulting. (Id. at 152-53). Ron Mueller was given a promotion which he accepted and then left to take another job. (Id. at 148-49). Bill Peterson left after Alexander told him the company was not going to hire in-house for the job ultimately given to Paul Priest. (Id. at 145-50).

Most of Alexander's employment decisions involved employees or prospective employees who are not shown to have been similarly situated to Mr. Edmund. There is no evidence other than the gender of the persons involved that any of the employment decisions in which Mr. Alexander was involved were other than for legitimate, nondiscriminatory reasons.

Mr. Edmund argues there is other evidence which supports the allegation of gender bias against Alexander but this evidence does not, in the Court's judgment, create a genuine issue of fact on the issue. Mr. Vair's belief that Alexander preferred to hire women was based on the gender makeup of the department and his discussions with other male employees, not on statements or acts of Mr. Alexander. This opinion testimony adds little to the statistical information, incorporates hearsay, and is therefore of doubtful admissibility. See Mays v. Rhodes, 255 F.3d 644, 648 (8th Cir. 2001)(only admissible evidence considered on summary judgment, citing cases); Fed. R. Civ. P. 56(e). Alexander's reported attraction to women with large breasts suffers from the same admissibility problems and is conclusory. From his review of the depositions of several women employees Mr. Edmund concludes Alexander encouraged, coached and supported the women concerned but did not do the same for him. This represents Mr. Edmund's impression of the testimony, but that several women employees had a positive impression of their interactions with Alexander and Edmund did not does not support an inference of discrimination. Finally, Edmund notes that three female employees received follow-up reviews shortly before Alexander left Human Resources, (Pl. App., Exs. E, F and G), but Alexander did not do one for him. This

circumstance, in view of the number of employees in the department, also is not probative of gender bias.

Prima Facie Analysis

Returning to consideration of the prima facie case, it is difficult to conclude that the evidence on the prima facie elements supports an inference of discrimination with respect to the demotion. Of the first three elements, only the second is in dispute, whether Edmund was meeting MidAmerican's legitimate expectations. In his motion papers, Edmund addresses all of the significant complaints made about his performance. In some particulars his testimony and affidavits in this regard are conclusory, but there is enough specificity to avoid summary judgment for this reason. See Miller v. Citizens Sec. Group, Inc., 116 F.3d 343, 346 (8th Cir. 1997). Moreover, MidAmerican demoted him not because he was failing to do his job properly, but because his approach to the job and attitude on compensation issues was not what MidAmerican wanted for the new organization. There are genuine issues of material fact concerning Edmund's performance of his job.

The problem is with the fourth element. Edmund's demotion and Vair's replacement of him were part of the same employment decision. Edmund's replacement by another male obviously does not create an inference of gender discrimination. MidAmerican did not seek a similarly qualified candidate to replace Edmund after the

demotion, it had Vair in mind to take over management of compensation for the merged companies before the demotion was made. The only evidence which could support an inference of discrimination as well as supply the Duffy "background circumstances" is Alexander's gender track record in making employment decisions. The requirement is that the evidence reasonably support an inference of discrimination. An inference is "[a] conclusion reached by considering other facts and deducing a logical consequence from them." Black's Law Dictionary 781 (7th ed.) It is a conclusion which "can be drawn from the evidence without resort to speculation." P.H. v. Sch. Dist. of Kansas City, ___ F.3d _____, _____, 2001 WL 1021020, *2 (8th Cir. Sept. 7, 2001)(quoting Sprenger, 253 F.3d at 1110). Standing alone a raw numerical gender breakdown of a handful of individual, dissimilar employment decisions, the outcomes of which are more favorable to one gender, does not reasonably or logically lead to the conclusion that the decision maker has a gender bias or that a particular employment decision was motivated by gender. See Hopper v. Hallmark Cards, Inc., 87 F.3d 983, 989 (8th Cir. 1996); Larson § 9.02[2] at 9-10 ("Because an individual plaintiff claiming disparate treatment must create an inference of discriminatory motivation as to the particular employment decision at issue, statistics alone should not ordinarily be sufficient to establish

a prima facie case."); see also Duffy, 123 F.3d at 1039. The many factors which may and usually do go into hiring, firing, promotion and demotion decisions make such a thought process simplistic. However, as only a minimal showing at the prima facie stage is necessary to shift the burden to the employer to articulate its neutral reasons, Sprenger, 253 F.3d at 1111, it is appropriate to assume a prima facie showing and pass on to the issue of pretext.

Edmund's prima facie case on his failure to promote claim is on more solid ground. He did not apply for the job given to Sammon as Vice President of Compensation, Benefits and Human Resources Information Services but the position was not posted or otherwise opened up for applications. With his extensive background he was an obvious candidate to consider, but he was given no consideration. His qualifications for the job are in dispute, but here also there is a genuine issue of material fact. A woman was hired for the position.

Pretext

MidAmerican has articulated and produced evidence of a legitimate nondiscriminatory reason for demoting and failing to promote Edmund. It did not believe Edmund had the qualities it looked for in the person who would manage the combined compensation system after the merger of MidAmerican and CalEnergy. The burden therefore shifts to Edmund to produce sufficient evidence from

which it could be found that the proffered reason was not the real reason, but a pretext for gender discrimination.

> To survive summary judgment at the third stage of the McDonnell Douglas analysis, "the rule in [the Eighth] Circuit is that an [employment-discrimination] plaintiff can avoid summary judgment only if the evidence considered in its entirety (1) creates a fact issue as to whether the employer's proffered reasons are pretextual and (2) creates a reasonable inference that [a prohibited motive] was a determinative factor in the adverse employment decision. "

Cronquist v. City of Minneapolis, 237 F.3d 920, 926 (8th Cir. 2001) (quoting Rothmeier v. Investment Advisers, Inc., 85 F.3d 1328, 1336-37 (8th Cir. 1996)). Usually a plaintiff is not required to produce "additional, independent evidence of discrimination" at the pretext stage as "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 148-49 (2000). However, proof of pretext "requires more substantial evidence . . . because unlike evidence establishing the prima facie case, evidence of pretext and discrimination is viewed in light of the employer's justification." Sprenger, 253 F.3d at 1111.

MidAmerican has produced evidence that senior management personnel, including Senior Vice President and General Counsel John Rasmussen and President Ronald Stepien shared the views of

Alexander and Hartje about Edmund's limitations, that is, generally, that he was rigid, resistant to change and not a strategic thinker. (Aff. of Rasmussen and Stepien; see supra at 7-11). Edmund has responded that the various criticisms are unfair, inaccurate and/or not adequately supported. The evidence, however, must go beyond merely raising a question about the fairness or wisdom of MidAmerican's judgments about Edmund to create an issue about the genuineness of his superiors' opinions. See Lee v. State, 157 F.3d 1130, 1135 (8th Cir. 1998)("Title VII does not 'prohibit employment decisions based upon. . .erroneous evaluations . . . ,'" quoting Hill v. St. Louis University, 123 F.3d 1114, 1120 (8th Cir. 1997)). Federal courts do not sit as "super personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent that those judgments involve intentional discrimination." Cronquist, 237 F.3d at 928 (quoting Hutson v. McDonnell Douglas Corp., 63 F.3d 771, 781 (8th Cir. 1995)); McCullough v. Real Foods, Inc., 140 F.3d 1123, 1129 (8th Cir. 1998); see Evers v. Alliant Techsystems, Inc., 241 F.3d 948, 957 (8th Cir. 2001); Duffy, 123 F.3d at 1038.

Apart from Alexander, Edmund does not identify evidence which impeaches the honesty of the perceptions of others in MidAmerican's management about his suitability to manage compensation after the merger. Rather, he argues that their

perceptions were the product of Alexander's gender motivated failure to support him in his dealings with senior management, and, more directly, Alexander's own biased opinions communicated to Hartje and others. The pretext analysis, therefore, gets back to Alexander's bias the only material evidence of which is in the employment decisions he made concerning men and women under him.

Statistical evidence "may support a finding of pretext, particularly where there are independent, direct grounds for disbelieving the employer's explanation" for the adverse employment action. Bogren, 236 F.3d at 406 (quoting Hutson, 63 F.3d at 778). However, just as statistical evidence is usually insufficient to meet the prima facie burden in a disparate treatment case, it also "'in and of itself, rarely suffices to rebut an employer's legitimate, nondiscriminatory rationale for its [adverse employment] decision . . . .'" Bogren, 236 F.2d at 406 (quoting LeBlanc v. Great American Ins. Co., 6 F.3d 836, 848 (1st Cir. 1993)). Statistics do not say much about an employer's reasons for taking a particular adverse employment action. Id. (citing Bullington v. United Airlines, Inc., 186 F.3d 1301, 1319 (8th Cir. 1999)). To be probative at the pretext stage statistical analysis must go beyond the numbers to examine the treatment of similarly situated male and female employees. See Evers, 241 F.3d at 958-59; Bevan v. Honeywell, Inc., 118 F.3d 603, 612 (8th Cir. 1997);

Hutson, 63 F.3d at 777; Williams v. Ford Motor Co., 14 F.3d 1305, 1309 (8th Cir. 1994). Such evidence is lacking in this case and is probably impossible to obtain in light of Edmund's managerial position, the small number of employees involved, and the underlying circumstances of the decisions to the extent shown in the summary judgment record.

For reasons stated previously, the evidence of Alexander's gender bias does not pass beyond speculation to the realm of reasonable inference. As there is no evidence that Edmund's gender influenced any other decision maker, Edmund has not created a fact issue as to whether MidAmerican's reasons for demoting him were pretextual or a reasonable inference that his gender was a determinative factor in the decision.

There is an additional pretext argument concerning the promotion decision. Edmund argues that because of his many years of experience he was much more qualified than Maureen Sammon for promotion to Vice President of Compensation, Benefits and Human Resources Information Services. The hiring of a less qualified candidate may support a finding that the employer's nondiscriminatory reason was pretextual. Duffy, 123 F.3d at 1037.

Mr. Edmund had about thirty years of combined experience in human resources and compensation management. Ms. Sammon had only a couple years experience in human resources and none in

compensation management. However, she had been responsible for creating a compensation and benefits system for the merger between MidAmerican and CalEnergy and her performance in this capacity had impressed MidAmerican's management. In 1995, following a previous MidAmerican merger with Midwest Utility Companies, Sammon had been given the job as Manager of Benefits and thus had experience in that part of the new job. (Levy Aff. at 2-3). Sammon also had a master's degree in business administration.

The difficulty with Edmund's pretext argument based on qualifications is that the demotion and promotion are inextricably tied together. Edmund had been demoted from compensation manager because of perceived shortcomings in his management abilities not many weeks before Sammon was promoted. Having been demoted for nondiscriminatory reasons Edmund has not shown were pretextual, he is not in a position to claim that he should have been promoted shortly thereafter back to a position in which he would not only resume management responsibility for compensation, but benefits as well. The earlier demotion thus significantly detracts from his argument that he was more qualified and as a result his greater experience is not evidence of pretext. Moreover, there is no evidence that Alexander had a role in the promotion decision and, by April 1999 when the decision was made, any influence Alexander might have had on Hartje's decisions was even more attenuated.

Thus, even if the relative qualifications of Edmund and Sammon afford some evidence of pretext, the evidence overall is short of providing a reasonable inference that gender was a determinative factor in the promotion decision.

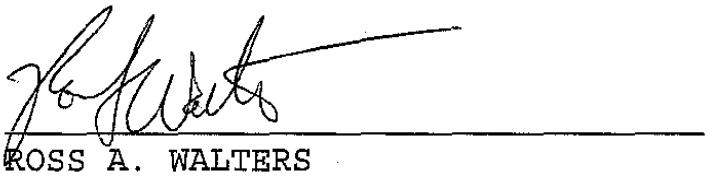
In the final analysis, the determinative issue on summary judgment is the sufficiency of the evidence to infer Alexander's alleged gender bias. The record does not reasonably support such an inference and as a result the evidence is also insufficient for a fact finder to conclude that MidAmerican unlawfully discriminated against Mr. Edmund on the basis of gender.

IV.

Defendants' motion for summary judgment is granted and the Clerk shall enter judgment dismissing the complaint.

IT IS SO ORDERED.

Dated this 21st day of September, 2001.



ROSS A. WALTERS
CHIEF UNITED STATES MAGISTRATE JUDGE