

**IN THE WESTERN DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION**

EQUAL EMPLOYMENT	)	
OPPORTUNITY COMMISSION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 00-0092-CV-W-2-ECF
	)	
PRAXAIR SURFACE	)	
TECHNOLOGIES,	)	
	)	
Defendant.	)	

**ORDER**

Pending before the Court is defendant Praxair Surface Technologies' ("Praxair") Motion for Summary Judgment (Doc. # 57). In this case the Equal Employment Opportunity Commission ("EEOC") alleges that Praxair impermissibly discriminated against Judy Kebler ("Kebler") on account of her sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq. Specifically, EEOC maintains that Praxair failed to promote Kebler to two positions for which she applied in 1997.

According to Fed. R. Civ. P. 56(c), summary judgment shall be rendered if 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." The moving party bears this burden of proof. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). If the moving party meets the initial burden, then the non-moving party is required to go beyond the pleadings and designate specific facts showing there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986), the Court emphasized that the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts" in order to establish a genuine issue of fact sufficient to warrant trial. A genuine issue of material fact exists when: (1) there is a dispute of fact; (2) the disputed fact is material to the outcome of the case; and (3) the dispute is genuine. Anderson, 477 U.S. at 248. Whether a disputed fact is material is determined by "the substantive law that is to be applied." Id. The dispute is genuine if the non-moving party had produced evidence such that a reasonable jury could return a verdict for that party. Id. In reviewing the motion for summary judgment, the Court must view the facts in the light most favorable to the adverse party and allow the adverse party the benefit of all reasonable inferences to be drawn from the evidence. Adickes, 398 U.S. at 157.

The EEOC asserts that Praxair discriminated against Kebler when its selection committee based its decision not to promote her on the fact that she is a woman.

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against any individual with respect to his compensation, terms, conditions, or privileges of employment; because of such individual's race, color, religion, sex or national origin. Such discrimination extends beyond terms and conditions in the "narrow contractual sense" and includes discriminatory harassment so severe or pervasive as to alter the conditions of employment and create a hostile working environment.

Carter v. Chrysler Corp., 173 F.3d 693, 700 (8th Cir. 1999) (internal citations omitted). In this case plaintiff has alleged no direct evidence<sup>1</sup> of sex discrimination by a decisionmaker and therefore the Court applies the burden shifting analysis articulated in McDonald Douglas v. Green, 411 U.S. 792, 802 (1973). Under McDonald Douglas, the EEOC is required to demonstrate a prima facie case of discrimination. If successful, the burden shifts to defendant to show a legitimate nondiscriminatory reason for deciding not to promote Kebler. Id. If the plaintiff fails to establish a prima facie case of discrimination, then the Court's analysis ends, and summary judgment is granted in favor of the defendant. Newton v. Caldwell Laboratories, 156 F.3d 880, 881 (8th Cir. 1998).

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<sup>1</sup> "In differentiating between direct and indirect evidence of [] discrimination, we must, in part, distinguish comments which demonstrate a discriminatory animus in the decisional process from stray remarks in the workplace, statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process." Breeding v. Arthur Gallagher and Co., 164 F.3d 1151, 1157 (8th Cir. 1999) (citing Fast v. Southern Union Co., 149 F.3d 885, 889 (8th Cir. 1998)). In the instant case, the evidence is indirect because plaintiff has alleged no facts directly supporting discriminatory animus in the decisional process.

To establish a prima facie case for failure to promote on account of sex, the EEOC must prove that Kebler: (1) was in a protected class; (2) met the applicable job qualifications and applied for the position; (3) was not promoted; and (4) a similarly situated employee, who was not a member of the protected group, was promoted instead. See Austin v. Minnesota Mining and Mfg. Co., 193 F.3d 992, 995 (8th Cir. 1999); see also O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996).

Once the EEOC demonstrates a prima facie case of discrimination, the burden shifts to Praxair to show a legitimate nondiscriminatory reason for its decision not to promote Kebler. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). If defendant is able to support that a legitimate nondiscriminatory reason exists for its decision, the burden shifts back to plaintiff who must establish that the proffered reason is pretextual. Bassett v. City of Minneapolis, 211 F.3d 1097 (8th Cir. 2000).

The Court has considered all the information submitted by the parties in making its decision and concludes that genuine issues of material fact remain in this case. See id. at 1099. These issues concern whether the EEOC has established a prima facie case<sup>2</sup> with respect to the Compressor Blades Team Leader position, and

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<sup>2</sup> The Court does not address whether plaintiff proved the second element of a prima facie case of failure to promote (that Kebler met the job's qualifications)

whether Praxair's proffered reasons for failing to promote plaintiff were pretextual. Consequently, it is **ORDERED** that Praxair's Motion for Summary Judgment is hereby **DENIED**.

It is **SO ORDERED**.

/s/ FERNANDO J. GAITAN, JR.

Fernando J. Gaitan, Jr.

United States District Judge

Dated: March 15, 2001  
Kansas City, Missouri

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because defendant stipulated to this element "for purposes of summary judgment." See Suggestions in Support of Defendant's Motion for Summary Judgment, p. 26 fn. 7 (Doc. # 58).