

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

Civil Action No. 03-4222

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

and

VARLA KRYGER,

Plaintiff/Intervenor,

v.

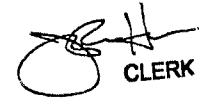
MITCHELL TEMPORARY, and DAKOTA PORK INDUSTRIES,

Defendants.

CONSENT DECREE
(Mitchell Temporary)

FILED

AUG 27 2004


CLERK

I. RECITALS

1. This matter was instituted by Plaintiff, Equal Employment Opportunity Commission ("Commission" or "Plaintiff" or "EEOC"), an agency of the United States government, alleging that, between September 1999, and March 2000, Defendant Mitchell Temporary denied employment to Varla Kryger, because of her disability, deafness, in violation of the Americans with Disabilities Act ("ADA").

2. Defendant Mitchell Temporary ("Mitchell"), is a partnership of Denise Arend and Lynette Vermeulen. Mitchell Temporary is no longer doing business. Neither Arend nor Vermeulen are presently owners or partners in any employee-placement business. As Arend and Vermeulen are presently employed, neither has authority for personnel decisions such as hiring, firing, employee discipline, or providing reasonable accommodation for disabled employees or applicants.

3. The Commission and Mitchell, desiring to settle this action by an appropriate Consent Decree ("Decree"), agree to the jurisdiction of this Court over the parties and the subject matter of this action, and agree to the power of this Court to enter a Consent Decree enforceable against Mitchell, and its principals, Arend and Vermeulen.

4. This Decree is final and binding upon the parties as to the issues resolved, as well as upon their successors and assigns.

5. The parties agree that this Consent Decree fairly resolves the issues alleged in this lawsuit, and constitutes a complete resolution of all of the Commission's claims of unlawful employment practices under the ADA that were made or could have been made in this action.

6. For the purpose of amicably resolving disputed claims, the Defendant joins with the Commission in requesting this Court to adjudge as follows:

IT IS ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

II. JURISDICTION

7. The parties stipulate to the jurisdiction of the Court over the parties and subject matter of this action, and have waived the entry of findings of fact and conclusions of law.

8. The duration of this Decree shall be three (3) years from the date of signing by the Court.

III. ISSUES RESOLVED

9. This Decree resolves all claims against Mitchell Temporary for damages arising out of the issues and claims set forth in the above-captioned lawsuit, Civil Action No. 03-4222.

10. Defendant and its officers, agents, employees, successors, and all other persons in active concert or participation with any of them will not interfere with the relief herein ordered, but shall cooperate in the implementation of this Decree.

IV. NON-ADMISSION OF LIABILITY

11. This Decree shall not constitute an adjudication and/or finding on the merits of the case. By entering into this Decree, the Defendant does not admit the allegations of the EEOC's Complaint, and maintains its contention that none of its acts, omissions, programs or practices has at any time violated the Americans with Disabilities Act.

V. MONETARY RELIEF

12. Defendant agrees to pay to Varla Kryger the amount of \$25,000 as payment for back pay, compensatory damages, interest, attorney fees, costs, and South Dakota sales tax. Defendant shall issue three checks, in the amounts specified in the release agreement attached hereto as Attachment B.

- 12.01 The first check will payable to Ms. Kryger for backpay, and will be subject to all required payroll deductions based on a W-4 form provided by Ms. Kryger. Defendant will issue a W-2 form to Ms. Kryger for this payment.
- 12.02 The second check will be payable to Ms. Kryger for compensatory damages and interest. No deductions will be made from the second check. Defendant will issue a form 1099 to Ms. Kryger for this payment.
- 12.03 The third check will be payable to the law firm of Gunderson, Palmer, Goodsell & Nelson, LLP, for attorney fees, costs incurred, and South Dakota sales tax. No deductions will be made from the third check. Defendant will issue a form 1099 to the law firm of Gunderson, Palmer, Goodsell & Nelson, LLP, for this payment.
- 12.04 Payment pursuant to this Paragraph 12 shall be paid by certified check within five business days after entry of this Consent Decree by the Court;
- 12.05 Defendant shall pay all administrative and/or other costs associated with the payment of monetary relief under this Decree.

VI. EQUITABLE RELIEF

A. Scope

13. The terms of this Decree shall apply to Mitchell Temporary, its principals, Denise Arend and Lynette Vermeulen, and any employee-placement business in which either Arend or Vermeulen hold an ownership interest during the term of the consent decree.

14. The term "Defendant", as used hereafter, shall refer to Mitchell Temporary and any employee-placement business in which either Arend or Vermeulen hold an ownership interest during the term of the consent decree.

15. The Mitchell principals, Arend and Vermeulen, are under an affirmative obligation during the term of this Consent Decree to inform EEOC within thirty (30) days of either (a) reopening Mitchell Temporary for business, or (b) acquiring an ownership interest in any employee-placement business. Such notice to EEOC will include certification of required postings under Paragraphs 18 and 24, below. Additionally, Arend and Vermeulen are under an affirmative obligation during the term of this Consent Decree to inform EEOC within thirty (30) days of accepting a position which includes responsibility for personnel decisions, such as hiring, firing, employee discipline, or providing reasonable accommodation for disabled employees and/or applicants.

B. Injunctive Relief

16. During the term of this Consent Decree, Defendant, its officers, agents, successors and other persons in active concert or participation with it, or any of them, are enjoined from engaging in any employment practice which discriminates on the basis of disability.

17. During the term of this Consent Decree, Defendant, its officers, agents, successors and other persons in active concert or participation with them, or any of them, are enjoined from engaging in reprisal or retaliation of any kind against any person because of such person's opposition to any practice made unlawful under the Americans with Disabilities Act, Title VII of the Civil Rights Act of 1964, as amended, the Age Discrimination in Employment Act, or the Equal Pay Act, because of such person's filing a charge, testifying or participating in any manner in any investigation, proceeding or hearing under any of these statutes, because such person was identified as a witness or possible witness for the Commission, because such person participated in any manner in this action or in the investigation giving rise to this action, or because such person is designated as an aggrieved individual under this Decree.

C. Anti-discrimination Policy

18. Defendant shall adopt and/or maintain a policy proscribing discrimination based on disability, and proscribing retaliation against any employee who complains about disability discrimination or who files a charge of discrimination regarding disability (“Anti-Discrimination Policy”). Defendant shall post and keep posted for the duration of this Decree, in a conspicuous place in each of its facilities, where notices to employees and applicants for employment are customarily kept or posted, a copy of the Anti-Discrimination Policy. Additionally, a copy of the Policy will be provided to each individual seeking employment placement services from Defendant.

D. Procedures to Provide Reasonable Accommodation

19. Defendant shall adopt and maintain a written policy that will address how reasonable accommodation will be provided, by request or otherwise, during the hiring process and in the course of employment. The policy must be distributed to all employees who interact with individuals seeking employment placement services from Defendant. The policy must provide guidance on how to determine what is a reasonable accommodation, including mandatory participation in the interactive process with the applicant/employee. Within thirty days initiating or reinitiating an employee-placement business, Defendant shall forward a copy of the policy described in this paragraph to the Commission and a letter indicating that the policy has been distributed and instructions provided to all employees who interact with individuals seeking employment placement services from Defendant.

E. Affirmative Hiring

20. In consultation with professionals from the South Dakota Department of Vocational Rehabilitation, Defendant shall adopt goals for hiring employees who are deaf or

hearing impaired, and Defendant shall seek to hire specified numbers of employees who are deaf or hearing impaired.

F. Training

21. If a principal (Arend or Vermeulen) reopens Mitchell Temporary, acquires an ownership interest in an employee-placement business, or accepts a position which includes responsibility for personnel decisions, within ninety (90) days of such development, she will undergo at least fourteen (14) hours of EEO training, including at least six (6) hours of ADA training.

22. Beginning in calendar year 2004, and annually thereafter, Defendant shall conduct annual training for all employees who interact with individuals seeking employment placement services from Defendant. Training will include the following: (a) review of the Defendant's policy and procedures for providing reasonable accommodation for individuals with disabilities; (b) review of the Defendant's anti-discrimination and anti-retaliation policies, with emphasis on the penalties for violating such policies, and (c) viewing a video of not longer than one (1) hour, approved by the EEOC. The EEOC will provide Defendant a list of approved videos, and Defendant may select from the EEOC list or may request that EEOC approve a video not listed.

23. The Commission, at its discretion, may designate one or more Commission representatives to attend any of the training sessions described above, and the representative(s) shall have the right to attend and fully observe all of the sessions. Defendant shall provide the Commission with thirty days notice that a training session will be conducted.

G. Notice Posting

24. Within five (5) business days after initiating or reinitiating an employee-placement business, Defendant shall post in a conspicuous place in each of its facilities where

notices to employees and applicants for employment are customarily kept or posted, the Notice attached as Attachment A to this Decree. The Notice shall remain posted for the duration of this Decree. If the Notice becomes defaced or illegible, Defendant will replace it with a clean copy. Additionally, a copy of the Notice will be provided to each individual seeking employment placement services from Defendant.

H. Record Keeping And Reporting Provisions

25. For the duration of this Consent Decree, Defendant shall maintain all records concerning implementation of this Consent Decree. The Commission shall have the right to interview any personnel employed by Defendant for the purpose of determining Defendant's compliance with the terms of this Consent Decree. In the event the Commission exercises its right to interview personnel pursuant to this paragraph, said interviews shall be scheduled with due regard to the convenience of the individual to be interviewed.

26. Each party shall bear its own costs in conjunction with the maintenance of records, preparation of any report, access or copying of records, or interviews of employees.

27. Defendant shall provide semi-annual reports for each six-month period following the date the Court signs the Decree. The reports shall be due thirty days following the respective six-month period, except the final report which shall be submitted to the Commission two weeks prior to the date on which the Consent Decree is to expire.

28. Each report shall provide the following information:

Complaints of Disability Discrimination

28.01 The name, address and telephone number of each person making a complaint of disability discrimination to Defendant or to any federal, state, or local government agency.

- 28.02 A brief summary of each complaint, including the date of the complaint, the name of the individual(s) who allegedly engaged in the discriminatory conduct, the Defendant's response to the complaint, the name of the person who investigated or responded to the complaint, and what, if any resolution was reached;
- 28.03 Copies of all documents memorializing or referring to the complaint, all documents gathered or created during investigation of the complaint, a summary of the investigation conducted and final disposition of the complaint.
- 28.04 For purposes of this Paragraph 28, the term "complaint of discrimination" will include any written or verbal complaint which alleges disability discrimination, or alleges conduct, which the Defendant recognizes as presenting an allegation of disability discrimination. For example, an employee may complain that he was denied promotion because of disability, or that co-workers call him "gimp" and tease him about his disability. These are "complaints of discrimination" even though the employee does not expressly allege discrimination.

Reasonable Accommodation Procedures and Results

- 28.05 Defendant shall re-certify that it continues to utilize the formal procedures for processing reasonable accommodation requests, required under Paragraph 19 above.
- 28.06 A brief summary of each request for accommodation, including the date of the request, the person or persons to whom the request was made, the

person or persons responsible for responding to the request, any effort to engage in the interactive process with the person requesting accommodation, what accommodation was requested, whether the request was granted, and if not, an explanation of the reasons for denying the request, whether an accommodation was provided and if so, what accommodation was provided, and a summary of the decision-making process utilized in determining what accommodation to provide.

28.07 Copies of all documents memorializing or referring to the request for accommodation, the interactive process, any investigation undertaken, and/or final disposition of the request.

Affirmative Hiring

28.08 Defendant shall describe the recruiting efforts made to seek qualified individuals who are deaf or hearing impaired, to fulfill the established hiring goals, and Defendant's results in hiring and maintaining qualified individuals who are deaf or hearing-impaired.

Training

28.09 Defendant shall submit copies of the agenda of the training programs, identify the individuals providing the training, and provide the registries of attendance. If training is conducted by Defendant's employees, Defendant shall provide a résumé of qualifications for each trainer/instructor.

Posting of Notice

28.10 Defendant shall re-certify to the Commission, that the Notice required to be posted under Paragraph 24 of this Consent Decree has been properly

posted or, if removed, was promptly replaced, during the duration of the reporting period.

VII. RETENTION OF JURISDICTION AND FILING OF DECREE

29. This Court shall retain jurisdiction of this cause for purposes of compliance with this Decree and entry of such further orders or modifications as may be necessary or appropriate to effectuate equal employment opportunities for employees. Upon submission of the final report referenced in Paragraph 27, and the expiration of a period of 30 days after submission of said report, within which the Commission has not filed an objection thereto, the Commission and Defendant shall promptly file a Joint Stipulation for Dismissal with Prejudice ("Joint Stipulation") of this civil action, upon which filing this Decree shall automatically dissolve, and this Civil Action shall be dismissed with prejudice. If the Commission files an objection to the final report within said 30-day period, the Parties will file the Joint Stipulation promptly after the Court's resolution of the Commission's objection.

VIII. ENFORCEMENT

30. There is no private right of action to enforce Defendant's obligations under the Decree and only the Commission may enforce compliance herewith.

31. Enforcement may be had by the Commission petitioning the Court for enforcement of the terms of this Decree.

IX. EEOC AUTHORITY

32. With respect to matters or charges outside the scope of this Decree, this Decree shall in no way limit the powers of the Commission to seek to eliminate employment practices or acts made unlawful by any of the statutes over which the EEOC has enforcement authority, and are unrelated to the claims asserted in this lawsuit.

X. COSTS AND ATTORNEY'S FEES

33. Except as specifically set forth herein, each party shall be responsible for and shall pay its own costs and attorney's fees.

XI. NOTICE

34. Any notice, report, or communication required under the provisions of this Decree shall be sent by certified mail, postage prepaid, to the appropriate parties as follows:

Regional Attorney
Denver District Office
Equal Employment Opportunity
Commission
303 E. 17th Avenue, Suite 510
Denver, CO 80203

Mitchell Temporary
c/o Jack Theeler
Morgan, Theeler, Wheeler, Cogley &
Petersen, LLP
221 E. 3rd Avenue
P.O. Box 1025
Mitchell, SD 57301-7025

Denise Arend
25951 Highway 37
Mitchell, South Dakota 57301

Lynette Vermeulen
300 East 14th Avenue
Mitchell, South Dakota 57301

SO ORDERED this 27th day of August, 2004.

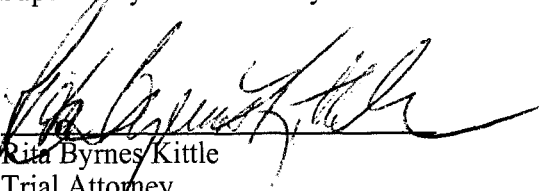
BY THE COURT:

Karen E. Schreier
United States District Judge

APPROVED AS TO FORM:

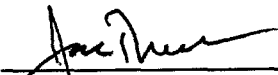
Joseph H. Mitchell
Regional Attorney

Nancy A. Weeks
Supervisory Trial Attorney


Rita Byrnes Kittle
Trial Attorney
(303) 866-1347

Equal Employment Opportunity
Commission
303 East 17th Avenue, Suite 510
Denver, CO 80203

Attorneys for Plaintiff

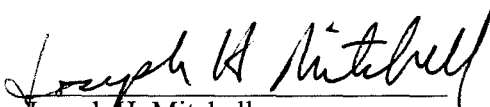

John S. Theeler
Morgan Theeler Wheeler Cogley &
Peterson LLP
PO Box 1025
221 East 3rd Avenue
Mitchell, SD 57301-7025

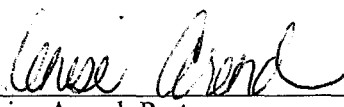
Attorneys for Defendant Mitchell Temporary


BY CONSENT:

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

MITCHELL TEMPORARY

BY: 
Joseph H. Mitchell
Regional Attorney
8/20/04
Date

BY: 
Denise Arend, Partner
8-17-04
Date

BY: 
Lynette Vermeulen, Partner
8-11-04
Date

ATTACHMENT A

NOTICE

The following notice is being posted pursuant to the terms of a Consent Decree reached between the parties in EEOC v. Mitchell Temporary, filed in the United States District Court for the District of South Dakota, Civil Action No. 03-4222.

Management of Mitchell Temporary wishes to emphasize the company's fundamental policy of providing equal employment opportunity in all of its operation and in all areas of employment practices, and to ensure that there shall be no discrimination against any employee or applicant for employment on the grounds of race, color, religion, sex, pregnancy, national origin, age or disability. This policy extends to insurance benefits and all other terms, conditions and privileges of employment.

Pursuant to the Americans with Disabilities Act, it is unlawful for an employer or an employee placement service to discriminate based upon an employee or job applicant being disabled. Further, it is unlawful for any employer or employee placement service to retaliate against an employee because he or she has opposed discriminatory employment practices, including disability discrimination, or because he or she has filed a charge of discrimination with any municipal, state or federal equal employment opportunity agency, or because he or she has participated in an investigation of a charge of discrimination.

Mitchell Temporary respects the right of its employees and applicants for employment to work in an environment free from discrimination. Accordingly, Mitchell Temporary reaffirms its commitment to complying with the strictures of the Americans with Disabilities Act, in that it is our policy to prohibit all discrimination in terms of hiring, promotion, compensation, benefits, discharge or discipline because of disability.

Any employee who believes that he/she has suffered discrimination on the basis of age, race, color, religion, sex, pregnancy, national origin, or disability, has the right to contact the EEOC directly at 1-800-669-4000. In compliance with federal law, no official at Mitchell Temporary will retaliate against an employee or applicant who makes an internal complaint of discrimination or who contacts the EEOC or its state counterpart.

This Notice shall remain posted for the term of five years.

Mitchell Temporary

By: _____

Date: _____