

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

HOLLY MATHERS, SUE
GUNDY, ROSE SEELEN
and DIANNE THIEL, on
behalf of themselves and
all others similarly situated,

Court File No. 99-1938
MJD/RLE

Plaintiffs,

v.

NORTHSHORE MINING CO.,
a Delaware corporation.

Defendant.

**MEMORANDUM IN SUPPORT OF STIPULATION FOR PRELIMINARY APPROVAL
OF SETTLEMENT AGREEMENT AND CLASS ACTION SETTLEMENT NOTICES**

I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 23(e), the parties to this case move the Court to issue an order granting preliminary approval of the attached Settlement Agreement, which resolves all claims asserted in this employment discrimination class action. The parties also seek approval of the proposed mailed and published notices of settlement to the settlement class, and request that the Court schedule a hearing to consider final approval of the proposed settlement.

The parties view the proposed settlement as a desirable alternative to the uncertainty, expense, and delay that would result from further litigation. At the same time, the parties believe that the settlement advances and protects the interests of all members of the settlement subclasses, further described below. The parties submit that the Agreement is fair, reasonable and adequate in all respects, and is the product of extensive, non-collusive negotiations, and provides

substantial equitable and monetary relief in lieu of further litigation and trial. The Agreement is fully endorsed by all counsel, the named representative plaintiffs, and the defendant.

This Settlement Agreement resolves all claims asserted in the Complaint filed on December 3, 1999 in United States District Court, District of Minnesota, Fifth Division, Court File No. 99-1938 (MJD/RLE), in the action captioned Holly Mathers, Sue Gundy, Rose Seelen and Dianne Thiel, on behalf of themselves and all others similarly situated, Plaintiffs, v. Northshore Mining Co., Defendant. The parties have agreed to stipulate and agree to three settlement sub-classes, in order to settle the pending claims, as further described below.

Accordingly, the parties request relief from the Court as follows:

1. Certification of three sub-classes of class members for settlement purposes, pursuant to Rule 23(b)(3) and Rule 23(c)(4) of the Federal Rules of Civil Procedure;
2. Preliminary approval of the Settlement Agreement and the scheduling of a fairness hearing; and
3. Approval and authorization of a class notice to be sent to the class members in accord with Rules 23(c) and 23(e) of the Federal Rules of Civil Procedure.

II. PROCEDURAL BACKGROUND

On or about February 19, 1999, Holly Mathers filed a Charge of Discrimination with the Equal Employment Opportunity Commission, with dual filing at the Minnesota Department of Human Rights, alleging discrimination based on gender, in the terms and conditions of her employment at Northshore Mining Company. She alleged on behalf of herself, as well as on behalf of all other women similarly situated at the Company, that Northshore Mining Company discriminated against female employees in regard to assignments, promotions, overtime and training.

In September 1999, the EEOC issued a “Right to Sue” letter, and in December 1999, this class action discrimination suit was filed. The Complaint sought relief for the named representatives as well as a class of their co-workers, asserting claims under both the Minnesota Human Rights Act, Minn. Stat. § 363.01 et seq., and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq.

Written discovery began in March 2000, with disputes over the scope of discovery leading to filing of written memoranda, and the issuance of a Minute Order by Magistrate Raymond Erickson. Magistrate Erickson allowed discovery to encompass the time period beginning with Holly Mathers’ hire in 1994, and include all departments at Northshore Mining Company. Over 25,000 documents, including extensive personnel and payroll records, were produced by Northshore Mining Company in December 2000, with thousands of additional documents produced in the following several years.

The depositions of the four named plaintiffs were taken in July 2001, and depositions of several Northshore Mining Company managers were taken in October 2001. Written discovery continued through the Spring of 2002. Expert economists or statisticians were retained by both the plaintiffs and the defendant. Expert reports were exchanged as part of the discovery process, and the depositions of the experts were taken in June 2002.

During the Summer of 2002, the cross-motions for Class Certification and for Summary Judgment were briefed and filed. Oral argument on the cross-motions occurred on November 1, 2002, before Federal District Judge Michael Davis in Minneapolis.

In a Memorandum Opinion and Order filed September 15, 2003, Judge Michael Davis denied defendant’s Motion for Summary Judgment, and conditionally certified a hybrid class under Rule 23(b), Fed. R. Civ. Proc., to include:

All hourly and non-exempt females employed by Northshore Mining Company on or after April 24, 1998, who have been,

are being or will be discriminated against with regard to the terms and conditions of their employment because of gender.

Northshore Mining Company filed a Petition for Permission to Appeal to the Eighth Circuit, but the interlocutory appeal was denied.

After providing potential class members with notice of the class action, and an opportunity to opt out of the litigation, the parties proceeded with additional post-certification discovery over the next twenty months. In accordance with Judge Davis' Order, the issues of liability and damages were bifurcated. Depositions of seventeen women who opted out of the litigation were taken during the Summer of 2004.

As a result of the mutual agreement of counsel, lengthy mediation sessions were held on August 9, 2005 and September 29, 2005, in Mediator Clifford Greene's office in Minneapolis, Minnesota, with two class representatives participating in the first session and all four named class representatives participating in the second session. A settlement was reached at the end of the session on September 29, 2005, after a total of twenty-two hours of intensive mediation.

III. TERMS OF THE SETTLEMENT AGREEMENT

The Settlement Agreement provides injunctive and monetary relief, consistent with the relief originally sought in the Complaint. The Class Members who participated in the litigation, rather than opting out after certification, are eligible to receive notice of the proposed settlement. All employees satisfying the class definition were served with notice of the class action and given an opportunity to "opt-out" or exclude themselves from the class.

Because of mutually-recognized differences in promotion, training, job assignment and overtime policies and practices among department and between hourly employees and non-exempt employees, the parties agree that it is appropriate for purposes of settlement to divide the class into the following sub-classes:

Group 1. Mine Operations department HBV-classified (hourly) employees

Group 2. Non-Mine Operations department HBX-classified (hourly) employees

Group 3. Administrative or HBX-classified (non-exempt) employees

A. General Equitable Relief

Northshore Mining Company agreed to implement a variety of changes relating to its training, promotion and job assignment policies, to be effective no later than sixty (60) days after the Final Approval Date, the general terms of which are summarized in the following paragraphs.

The Company agrees to designate an Anti-Discrimination Officer, with responsibility for investigating any and all complaints concerning gender discrimination. Any time a female non-exempt or hourly employee is denied a promotion, the Anti-Discrimination Officer shall investigate the reasons why that denial occurred and compare that promotion decision with promotion decisions affecting males in the same or similar position within the prior two-year period. A written analysis will be prepared and shared with the female employee presenting the complaint, thereby explaining the basis for the promotion denial and comparing the rationale for the promotion decision with rationale for the promotion decisions affecting male employees.

The Company agrees that Employees shall be allowed to request a promotion at any time, subject to satisfying time-in-position requirements. Consideration for promotion will not be dependent upon a supervisor authorizing the Request for Promotion.

The Company will modify its internal appeal procedure for disputes concerning promotions. In addition to the current procedures in place for appeals through the FAIR process, Northshore Mining Company will allow employees to appeal the denial of a promotion to an impartial arbitrator, rather than a team of their peers or the General Manager.

Consistent with the parties' desire to modify policies and procedures so as to provide equitable access to training and job assignment opportunities, Northshore Mining Company

agrees to schedule quarterly meetings in the Mine Operations Department that will involve the Area Mine Manager, Crew Coordinators, Training Coordinators, and a Human Resources Representative. These meetings will review the data generated by the Modular Mining System, involve coordinated communications among all crews regarding best practices and training issues, and review and monitor employee satisfaction of Technician promotion requirements, which includes a review of distribution of assignments and training. The quarterly reports concerning training and best practices will be communicated to the operating crews at one of the following monthly safety meetings.

The Company also agrees that the Mine Operations Department training coordinators will monitor promotions for crew members, and monitor training needs to qualify employees for promotions. At the time of the quarterly meeting, if a Technician is eligible for consideration for promotion to the next Tech level within the next 90 days, the quarterly meeting group members will review any deficiencies in the employee's status, and identify any areas still unsatisfied to qualify for promotion to the next Tech level. The group will also identify and evaluate reasons for any delays in enabling employees to satisfy all deficiencies affecting promotion. These promotion status reports will be communicated to the individual employees.

All HBY-classified Class Members who were denied promotion to the last HBY-classified position to which they requested a promotion will be promoted to that position effective not more than thirty (30) days after the Final Approval Date, or upon return to active employment if currently on leave, whichever comes later, so long as the employee maintains employee status with Northshore Mining Company. This "catch up promotion" will not apply to any employee who is separated from employment from Northshore Mining Company and terminates her employment status before returning from a current leave.

With respect to the equitable relief provisions in the Settlement Agreement, the parties agree that Northshore Mining Company may, if required by legitimate business necessity, make future changes in its training, assignments, and promotion policies and procedures, provided such changes are consistent with the spirit and objectives of this Agreement and provided such changes do not conflict with the express terms of this Agreement.

B. Monetary Relief

Northshore Mining Company has agreed to deliver to Class Counsel within seven (7) days after the Final Approval Date the sum of \$1,300,000.00, plus interest from the date of preliminary approval. Within seven (7) days after Preliminary Approval, Northshore Mining Company or its agent will deposit the sum of \$1,300,000.00 in a separate interest-bearing trust account, accruing simple interest at the Minnesota statutory judgment rate of four (4) percent per year, until final distribution is made. All accrued interest shall inure to the benefit of the class. Northshore Mining Company shall provide to Class Counsel written evidence confirming the establishment and funding of the separate trust account.

Northshore Mining Company has reserved the right to demand renegotiation of the Settlement Agreement, if any members of the Mine Operations (HBY-classified) Group 1 class members or if any members of the Non-Mine Operations (HBY-classified) Group 2 class members choose to opt-out of this settlement, after receiving notice of the same. If the parties are unable to reach an agreement on revised terms under these circumstances, Northshore Mining Company may elect to withdraw from the Agreement, which shall then be deemed null and void.

Assuming the Settlement Agreement is executed after class members are provided notice and have had an opportunity to respond to the same, the settlement proceeds will be distributed as follows:

1. **Class Representatives.** \$60,000, in equal shares, to the four Class Representatives who started the class action.

2. **Group 1 Class Members.** \$325,000 to Class Members who were/are employed in the Mine Operations Department at NSM on or after April 24, 1998 and prior to September 29, 2005, as identified in Exhibit 2 to the Settlement Agreement, subject to confirmation that the Class member was employed in the Mine Operations Department during the relevant time period for at least sixty days. Any Class Members employed fewer than sixty days will receive a payment of \$1000.

3. **Group 2 Class Members.** \$110,000 to Class Members who were/are employed in other technical positions (HBY-classified) in operating departments at Northshore Mining Company other than the Mine Operations Department on or after April 24, 1998 and prior to September 29, 2005, as identified in Exhibit 3 to the Settlement Agreement, subject to confirmation that the Class member was employed in this capacity during the relevant time period for at least sixty days. Any Class Members employed fewer than sixty days will receive a payment of \$1000.

4. **Group 3 Class Members.** \$25,000 (less the costs and attorneys' fees incurred to administer the claims process for Group 3) to be distributed to Group 3 Class Members employed as non-exempt employees (Administrative or HBX-classified employees) on or after April 24, 1998 and prior to September 29, 2005 who were subjected to gender discrimination and properly document their claims through the verified claims process. Group 3 Class Members are identified in Exhibit 4 to the Settlement Agreement.

5. **Emotional Distress Fund.** \$303,000 (less the costs and attorneys' fees to administer the claims process for the Emotional Distress Fund) to be distributed to Class Members who have suffered from emotional distress and mental anguish as a result of gender discrimination at

Northshore Mining Company and who properly document their emotional distress through the verified claims process.

6. Attorneys' Fees and Costs. \$240,000 to Class Counsel for attorneys' fees and \$237,000 to Class Counsel for reimbursement of out-of-pocket costs, including expert fees, for legal services provided through the Final Approval Date, and including legal services for the six-month and one-year reviews to monitor compliance with the Agreement. These payments do not compensate Class Counsel for attorneys' fees and costs to be incurred to administer the claims process for allocation of the Group 3 settlement fund and the Emotional Distress Fund. The attorneys' fees and costs for administration of those claims processes shall be paid directly from the respective funds being administered.

7. Claims Process for Group 3 Fund. All Group 3 Class Members are eligible to submit a claim for payment from the Group 3 Fund. Class Members in Group 3 (Administrative or HBX-classified employee) will not receive any portion of the settlement proceeds unless they submit a timely and valid claim form and qualify for a payment. Timely-submitted forms will be reviewed by Claims Administrator and an assessment will be made of the extent to which the Class Member was discriminated against, on the basis of gender, in regard to promotions, training, job assignments and overtime.

The costs and attorneys' fees incurred to administer the claims process for the Group 3 fund will be paid from the Group 3 fund. All remaining funds will be distributed. If verified, qualified claims made by Group 3 Class Members are determined by the Claims Administrator to be insufficient to justify an award of the entire amount allocated to Group 3 Class Members, the unused funds for Group 3 will revert to Group 2 Class Members.

8. Claims Process for Emotional Distress Fund. All Class Members are eligible to submit a claim for payment from the Emotional Distress Fund. Class Members will not

receive any portion of the settlement proceeds from the Emotional Distress Fund unless they submit a timely and valid claim for and qualify for payment. To make a claim for payment from this fund, Class Members must submit a timely claim form.

Class Members will be required to submit medical evidence to support a claim for emotional distress. Timely forms will be reviewed by the Claims Administrator and an assessment will be made of the extent to which each Class Member submitting a timely claim suffered from emotional distress as a result of gender discrimination in promotions, training, job assignments and overtime. Following review of all claims submitted for distribution of the Emotional Distress Fund the fund will be distributed according to the severity of claimed emotional distress documented.

The costs and attorneys' fees incurred to administer the claims process for the Emotional Distress Fund will be paid from the Emotional Distress Fund. All remaining funds will be distributed to those submitting valid, qualifying claims, regardless of the number of claims received. If no valid, qualifying claims are received, the Emotional Distress Fund shall revert on a pro rata basis to the Group 1, Group 2 and Group 3 funds.

9. Payment Procedures. As soon as practicable after the Claims Administrator has made final allocations of the Group 3 fund and the Emotional Distress Fund, Class Counsel shall notify Northshore Mining Company of the final allocation of all funds payable to Class Representatives, Class Members and Class Counsel, prior to the addition of accrued interest, which shall be allocated to all recipients on a pro rata basis. Northshore Mining Company shall then deliver to Class Counsel for distribution to Class Members checks issued to Class Representatives, Class Members and Class Counsel for their respective shares of the settlement and their pro rata share of accrued interest. Northshore Mining Company shall issue separate checks for money allocated from the Emotional Distress Fund.

Included with each check issued by Northshore Mining Company will be a statement showing the gross amount of the payment and an itemized statement of all deductions made. Excepting payments from the Emotional Distress Fund and accrued interest, deductions will be made for federal and state income taxes and the employee's share of social security and Medicare tax deemed by Northshore Mining Company to be due based upon the W-4 form most recently filed by the past or current employee. Payments from the Emotional Distress Fund will be subject to deductions for federal and state income tax withholding only, as determined based on the W-4 form most recently filed by the former or current employee. All checks shall be delivered by Northshore Mining Company to Class Counsel for distribution within seven (7) days of the Final Approval Date.

IV. ARGUMENT

A. Standards for Preliminary Approval

Rule 23(e) of the Federal Rules of Civil Procedure requires Court approval of any settlement, voluntary dismissal, or compromise of claims of a certified class. Public policy favors settlement in court actions, and specifically, in class actions implicating claims of employment discrimination. See Carson v. American Brands, Inc., 450 U.S. 79, 88 n.14 (1981).

Approval of a proposed class action settlement is within the broad discretion of the Court. Ryan v. Minnesota Higher Education Services Office, 2003 WL 23538110 at 8 (D. Minn. 2003). If the proposed class action settlement is fair, adequate, and reasonable, judicial approval should be granted. Id. To evaluate the propriety of preliminary approval of settlement, the Court evaluates five factors:

1. The strength of plaintiffs' case balanced against the amount offered in settlement;

2. The opinions of the participants, including class counsel, class representatives, and class members;
3. The complexity, expense, and likely duration of further litigation;
4. The extent of discovery completed and the stage of the proceedings; and
5. The evidence, if any, that the proposed settlement is the product of fraud or collusion.

Id. (quoting Holden v. Burlington Northern, Inc., 665 F. Supp. 1398, 1405 D. Minn. 1987) (other citations omitted).

1. The strength of plaintiffs' case balanced against the amount offered in settlement.

The claims presented by plaintiffs implicated both intentional discrimination and disparate impact claims. The lead class representative, Holly Mathers, was unable to convince the EEOC to issue a probable cause finding. The statistical evidence was disputed and subtle by standards utilized by statisticians and would need to be bolstered by anecdotal evidence to prove the claim for continuing violation and "pattern and practice" violations throughout the Company, in order to prevail on the discrimination claims on a class basis. The statistical evidence did initially, however, show a statistically significant pattern of women being promoted more slowly than men to comparable positions and women earning less than men at most levels and in most departments, potentially due to slower promotions, overtime or assignment issues. Northshore Mining Company had compelling arguments to demonstrate the invalidity of plaintiffs' statistical analysis given the complexity of the factors involved in making employment decisions, differences among supervisors in implementing employment policies and differences among employees in pursuing opportunities; accordingly, the Company intended to move for decertification, in all or in part, of the class due to the individualized inquiry that ultimately would be required to determine the reasons for individual employment decisions.

The Settlement Agreement was negotiated after twenty-two hours of intensive mediation sessions, moderated by an mediator experienced in employment litigation and class actions, with both parties making concessions that reflected the uncertainties and risks they all faced in proceeding with litigation. Substantial equitable and monetary relief are reflected in the Settlement Agreement, addressing both types of claims as asserted in the original Complaint.

2. The opinions of the participants, including class counsel, class representatives, and class members.

As reflected by the Stipulation for Preliminary Approval, the parties and counsel are in agreement that the proposed settlement is reasonable. Unless there is evidence of fraud or collusion, a court should defer to the judgments of experienced counsel in presuming reasonableness. Ryan, 2003 WL at10 (citing Cotton v. Hinton, 559 F.2d at 1330-31 (5th Cir. 1977)).

3. The complexity, expense, and likely duration of further litigation.

As reflected by the attorneys' fees and costs (consisting primarily of fees paid to experts for review and statistical analysis of employment records and fees for depositions and records production) proposed by plaintiffs' counsel in the Settlement Agreement, the litigation already has resulted in significant expenditures of time and money by both parties. To reach trial-ready status on the merits of the claims, both parties would have significant additional discovery to conduct, including additional statistical analysis by their respective experts, which both parties agreed would likely result in hundreds of thousands of dollars in additional litigation fees and expenses for both parties.

Moreover, because of the bifurcated nature of these class claims, even after the liability phase was concluded over the next year or more, the damages phase would still need to occur (assuming plaintiffs' were successful in establishing liability) which would require separate trials for the forty-two remaining class members to determine individual damages. Any recovery by

any of the class members through litigation would be unlikely for a period of at least three or more years, exclusive of appeals. Even with additional years of litigation and significant additional expenses, the class members would not be assured of any recovery.

4. The extent of discovery completed and the stage of the proceedings.

The parties are well-postured to evaluate the merits and potential damages in this suit, after four years of exhaustive collection and discovery of virtually all personnel records and payroll data of Northshore Mining Company, expert review and statistical analysis of those records and depositions of class representatives, Company human resources personnel and nearly every female who opted out of the class. The defendant's motion for summary judgment and the cross motions on class certification, which the court carefully considered while under advisement for nearly twelve months, reflected the complexity of the issues and facts in the case, and counsel's knowledge regarding the same. Settlement was approached with a thorough recognition of the issues, potential damages, and risks involved.

5. The evidence, if any, that the proposed settlement is the product of fraud or collusion.

The two lengthy mediation sessions were conducted by an impartial, third-party mediator, well experienced in employment litigation and mediation of class actions, with each side bearing one-half the costs of the mediation session. The case has been hotly contested and extensively litigated since the filing of the Complaint in December 1999 and the underlying allegations disputed since the initial charge upon which the class action is based was filed with the EEOC in February 1999. No suggestion of fraud or collusion is evident.

B. The Proposed Notices to Class Members Should be Approved

Rule 23(e) requires that the Court authorize a notice for distribution personally to class members informing them of the proposed settlement, the essential terms of that settlement, their rights to object to and comment on the Settlement Agreement, and the date of a fairness hearing

to be conducted by the Court, at which time any objections or comments from class members and the parties would be heard.

Because the Court certified this class action with a hybrid class under Rule 23(b)(3), Federal Rules of Civil Procedure, the notice also shall provide class members with an opportunity to opt out of the proposed settlement. The notice “must be neutral and must be sufficient to alert prospective class members to the pendency and terms of the proposed settlement, and to the options that are open to them in connection with the proceedings.” Ryan, 2003 WL 23538110 at 11.

In the Stipulation for Preliminary Approval, and the proposed Notice form, the parties outline the notice contents and procedure for response by class members. The notice reflects disclosure of the proposed settlement in neutral and understandable terms, and provides for a right to opt out and attend a fairness hearing, in compliance with Rule 23(e), Federal Rule of Civil Procedure.

V. CONCLUSION

For the foregoing reasons, the parties respectfully request that the Court issue a preliminary order approving the parties’ settlement and proposed notices to class members.

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