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

GLENA TJERNAGEL, Plaintiff, vs. THE GATES CORPORATION, d/b/a THE GATES RUBBER COMPANY, Defendant.	)	CIVIL NO. 4-06-CV-362-TJS **ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Defendant The Gates Corporation d/b/a The Gates Rubber Company (Gates) filed its Motion for Summary Judgment on April 20, 2007 (Clerk's No. 29). At the same time, it filed its brief in support of that motion, its statement of material facts not in dispute, and its appendix (Clerk's No. 30).

Plaintiff Glena Tjernagel (Tjernagel) filed her resistance to defendant's motion (Clerk's No. 36) on May 14, 2007, and filed her brief in support of that motion; her response to defendant's statement of material facts; her statement of material facts and her appendix (Clerk's No. 37).

Thereafter, defendant filed his reply (Clerk's No. 46), as well as a supplemental appendix (Clerk's No. 44).

The Court conducted oral arguments on the pending motion at the United States Courthouse, Des Moines, Iowa on June 14, 2007. The motion is ready for ruling.

For the reasons set forth below, defendant's Motion for Summary Judgment shall be and is granted.

BACKGROUND

The following statement is made in the light most favorable to Tjernagel, the non-moving party:

Tjernagel was hired as a part-time production employee at Gates' Boone, Iowa plant on May 22, 1995. She was laid off on June 6, 2001, and rehired on June 10, 2003, becoming a full-time employee on August 30, 2004, assigned to the day shift, when Gates eliminated all part-time employees. She was terminated by Gates on January 17, 2006.

Tjernagel was diagnosed with multiple sclerosis (MS) by her family physician in 2005. Following that evaluation and examination, she was treated by Dr. Bruce Hughes. There is a dispute between the parties as to whether Tjernagel has actually been diagnosed with MS, or has been assigned the medical acronym of Clinically Isolated Syndrome (CIS). Essentially, MS and CIS are supported by the same physical manifestations; their frequency and duration may differ. CIS appears to be a differential diagnosis adopted by some neurologists when treating patients who have MS-like symptoms, but who may not fit within the strict diagnostic definitions of MS. See, generally, deposition of Dr. Bruce Hughes, defendant's appendix, pp. 191-241 (Clerk's No. 37), pp. 53-67.

In addition, Tjernagel also was diagnosed with having Carpal Tunnel Syndrome. While Carpal Tunnel Syndrome can be surgically repaired, in Tjernagel's case her treating physicians never determined whether Tjernagel's wrist and hand complaints were caused by Carpal Tunnel Syndrome or MS/CIS.

The Boone, Iowa plant operated by Gates manufactured hosing for commercial uses. As part of the production process, there were several lines on the plant's production floor, including

cutting the hose to size, "skiving," putting a cloth guard over the hose, "scrunching" the guard material, "crimping," and putting caps on the ends of the hose, and packing the hose for shipping. In addition to production work, there are also other separate areas as part of the production process involving "Rework," "Embossing" and "Short Run Cell" (SRC).

Tjernagel's job duties are set forth in the Gates-Boone Division Hydraulic Hose Assembly Job Description, defendant's appendix (Clerk's No. 30), pp. 155-156. Stated succinctly, Tjernagel was required to be able to do the following: repetitive body movements, particularly fingers and hands, legs and feet; work from a standing position with repeated twisting, bending, lifting, pulling and leaning; constant use of a foot pedal from a standing position with weight on one foot; lifting and carrying up to 40 pounds; reaching for, lifting and carrying materials and/or equipment of up to 40 pounds; pulling hoses off reels or bails; pushing/pulling material handling carts fully loaded; operating, cutting, skiving, insertion, crimping, banding and material handling equipment; a high percentage of attendance in on-time arrival; ability to handle several tasks; and ability to change from one job to another to meet customer requirements.

Additionally, work was scheduled for eight-hour shifts, with overtime required to meet production demands, including Saturday and Sunday work when necessary.

Employees at the Boone plant on the production lines rotated jobs at various time intervals including, but not limited to, every several hours, to every day, to a less frequent schedule depending upon production needs. There were no regular or permanent light duty positions at the Gates Boone facility.

Tjernagel began working on the day shift at the Boone plant in September 2005 as a utility worker. A utility person could be sent to different areas to work on any given day

depending upon personnel needs. When plaintiff began her work on the day shift, she was advised she was classified as a utility person, and ordered to report to the SRC area at the beginning of each shift. Tjernagel believed that subsequent to her start on the day shift, she was told that she was part of the SRC team, and after that she continued to report to the SRC area at the beginning of each shift. Even after being assigned to the SRC team, Tjernagel was ordered to work in other production areas, mainly Line 5. She worked on Line 5 several months before being diagnosed with MS, and Tjernagel believed the work on that line was more physically demanding than work on other lines in the plant, or in the SRC area. Line 5 had the highest number of work stations among the various production lines at the Boone plant. Beginning in late summer or early fall of 2005, Tjernagel spent more time working in areas other than the SRC, resulting in her receiving directions to report to Line 5 at the beginning of each shift. Later she was again ordered to report to SRC at the start of each shift.

On Line 5, work involved hose cutting, for which plaintiff was not trained, skiving, installing couplings, pushing the cloth guard over the hose, scrunching the guard, crimping and putting caps on the ends of the hose. In addition, the hose was packed for shipping on that line. Skiving can be done from either a standing or sitting position; pushing the guard on the hose can be done from a standing or sitting position; scrunching must be done from the standing position; one crimping position is usually done from a standing position, while the second function could be performed while sitting. The capping function could sometimes be done from a sitting position, but at other times must be done from a standing position. Packing could be done from both a sitting and standing position. Chairs were provided for workers on Line 5.

Tjernagel was diagnosed with Carpal Tunnel Syndrome in the summer of 2005, and later in that same period she advised defendant that she had MS. Gates, through its human resources manager, advised Tjernagel that if she needed to sit down to take extra breaks, if she needed to sit down or whatever she needed, she was to notify defendant.

In July 2005, Tjernagel applied for FMLA leave in order to have time to take off for doctors' appointments. Her FMLA Medical Certification form was signed by Dr. Hughes on July 21, 2005, and sent to Gates. That certification not only indicated that it would be necessary for Tjernagel to be absent from work for treatment, but also stated that it was "possible" that Tjernagel would be "unable to perform any one or more of the essential functions of her job." See, Exhibit 11, defendant's appendix (Clerk's No. 30), Exhibit D, pp. 157-158.

Tjernagel was permitted to attend doctors' appointments pursuant to the FMLA Certification, or stay home when she felt it necessary, and also permitted to leave work to return home when she felt that was required.

Between July and September 2005, on occasion, Tjernagel left her work area, including Line 5 and other lines, in order to go to another area to sit down, but she does not have any recollection of how many times this occurred. Generally, if Tjernagel left her work area, she went to the Rework or SRC areas. She was paid for times she spent resting, or when she was not present on a production line.

In September 2005, Dr. Hughes advised Tjernagel to, "Get your rights. You won't be able to keep your manual labor job."

On October 24, 2005, Tjernagel was advised that Gates required a Work Capacity Report to be filled out by Dr. Hughes, which was completed and returned to Gates on November 2,

2005, and identified Tjernagel's condition as MS because Hughes was concerned that Gates would not understand the diagnosis of CIS. The Work Capacity Report indicated that Tjernagel could return to her employment on an unknown date, subject to certain restrictions, including standing no more than 60% of a shift, and intermittent sitting versus standing. That report also indicated that Tjernagel knew what she could tolerate, and she could determine when certain things were going to aggravate her disease, noting that she could do sedentary work if possible. The report also directed that Tjernagel not work overtime.

On November 10, 2005, Tjernagel met with Gates' human resources manager, during which work accommodations which Tjernagel wanted were discussed. She referenced placement of cameras on the crimper to allow the operator to work from a lowered position. However, such a camera had already been installed on the crimping machine. Tjernagel also suggested moving the guard machine closer, by moving the table, on which guard material was placed, closer to the operator to avoid requiring the operator to stretch.

That same day, Tjernagel stated that she did not feel she was disabled, apparently in part because she had not filed for Social Security disability benefits because she could not establish that she was unable to work. Further, in that meeting Tjernagel stated the following: She could do certain jobs within the plant if she was allowed to sit and rest as necessary; she would know when a job was aggravating her symptoms, and she would advise her employer when that occurred; she could work 40 hours or less, but could not work any overtime. Tjernagel was told by Gates that the home office would be told what Tjernagel had said during the meeting, and that she should follow restrictions in the Work Capacity Report until Gates' home office responded.

After November 10, 2005, Tjernagel was never asked to work overtime, and never worked overtime again at the Gates Boone plant.

An evaluation of Tjernagel by Dr. Hughes on December 20, 2005 revealed that problems that she was having at work with her hands "may have been related to Carpal Tunnel Syndrome, and not necessarily related to her Clinically Isolated Syndrome." During the December 20, 2005 examination, Tjernagel advised Dr. Hughes that there were several aspects of her job she could not fully perform.

For the period from June 2005 through April 2006, the Gates Boone plant had no vacant positions in the SRC area, Embossing line or Rework line, or in the office.

Tjernagel was terminated by Gates on January 17, 2006, based upon her inability to work overtime, and because of her other work limitations. Within ten days of her termination, Tjernagel asked the Gates Boone plant manager if she could regain her job if she was permitted to work overtime. Tjernagel was advised by Gates to talk to her doctor to see if the restriction could be lifted, although she was not assured that she could return to work even if the restriction was lifted. In response, Tjernagel telephoned Dr. Hughes' office, and although she was not reexamined, she was advised by that office that she could work overtime. On January 25, 2006, Dr. Hughes signed a new Work Capacity Report, which contained the same restrictions as the November 2, 2005 Work Capacity Report, with the exception that the new report deleted reference to "no overtime." The new Work Capacity Report continued the restrictions of "intermittent sitting vs. standing," limiting the standing portion of work to less than 60% of the work time.

At the time Tjernagel was terminated on January 17, 2006, she was advised of the complaint and appeal procedure implemented by Gates, including the Peer Review System, allowing

21 calendar days from the date of her termination in which to seek a Peer Review appeal, if requested in writing. Tjernagel had appealed her termination through the Peer Review System at least by January 25, 2006. After receipt of the new Work Capacity Report on January 25, 2006, Gates suspended the deadline for plaintiff to submit her written Peer Review appeal.

Thereafter, there were attempts by Gates' plant physician to contact Tjernagel's physician, Dr. Hughes, but there were problems that interfered with contact between the two physicians. In fact, the Gates' plant physician and Dr. Hughes never made contact to discuss questions arising out of Tjernagel's second Work Capacity Report. However, on April 10, 2006, Dr. Hughes faxed to Gates a Work Release Form, stating in part that Tjernagel could return to work "without restrictions immediately." That release indicated that Tjernagel had told Dr. Hughes' office that Tjernagel needed no accommodations or restrictions whatsoever in order to perform the essential functions of her former job at Gates.

Tjernagel submitted her written Peer Review appeal letter on April 18, 2007, to which she attached the two Work Capacity Reports, dated November 2, 2005 and January 25, 2006, but did not include the April 10, 2006 release.

Tjernagel's appeal was denied by the Peer Review Panel.

Plaintiff has testified that when she was terminated on January 17, 2006, she had difficulty performing the following "life activities": fatigue, which prevented her from working on some days and not on other days; problems standing which resulted, after several hours, of numbness and tingling through her legs, waist and chest, interfering with her ability to breathe; walking, after standing for a period of time would result in a limp; short term memory; numbness and tingling throughout her arms and legs; and she thought her eyesight might have been affected.

As of the date of her termination, Tjernagel was able to drive a car; she cared for her children; prepared meals; went shopping; ran errands; fixed her hair; vacuumed her house; bathed herself; dressed herself; fed herself; helped her spouse with household activities; brushed her teeth; did laundry; and engaged in recreational activities. She was also able to write.

Tjernagel has worked a full-time job since May 2006, working in homes housing mentally challenged individuals. Her job duties include driving to and from work; arriving at approximately midnight; cleaning a restroom and a kitchen; completing charts and sitting most of the night, waiting for the individuals for whom she is caring to awake. Tjernagel did not advise her current employer at the time of her application that she had any medical or physical limitations or any medical condition. She has not requested any sort of accommodation in her present job related to any medical or physical condition.

THE LAW

District courts are cautioned that summary judgment should seldom be granted in employment discrimination cases because intent is often a central issue, and claims are often based on inference. Peterson v. Scott County, 406 F.3d 515, 520 (8th Cir. 2005); Wheeler v. Avantis Pharm., 360 F.3d 853, 857 (8th Cir. 2004); Breeding v. Gallagher & Co., 164 F.3d 1151, 1156 (8th Cir. 1999); Bassett v. City of Minneapolis, 211 F.3d 1097, 1099 (8th Cir 2000).

The Eighth Circuit Court of Appeals in Johnson v. Ready Mixed Concrete Co., 424 F.3d 806, 812 (8th Cir. 2005), stated:

> In one of our most oft-quoted passages, we said in 1994 that "[f]ederal courts do not sit as a super-personnel department that reexamines an entity's business decisions." Harvey v. Anheuser-Busch, Inc., 38 F.3d 268, 973 (8th Cir. 1994) (internal quotations omitted). One reason we emphasize this point is that a number of plaintiffs present a sympathetic situation in which the employer's

> judgment ... may appear poor or erroneous to outsiders. It is tempting to think that the role of the federal courts is to offer a remedy in that sort of case.... Our authority is to determine only whether there is a genuine issue for trial....

In this case, Tjernagel alleges that not only was she discriminated against in violation of the ADA, but that Gates retaliated against her when she sought to retain her position. Her actions are brought pursuant to the Americans with Disabilities Act, 42 U.S.C. 12101, et seq. and the Iowa Civil Rights Act.

Pursuant to Fed. R. Civ. P. 56, the Court must determine whether there are any material issues of fact in dispute that require trial, based on the evidence contained in the record before it. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986). If a party fails to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, summary judgment is mandated pursuant to Rule 56(c). Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

When ruling on a summary judgment motion, the Court must view the evidence "in the light most favorable to the non-moving party." Naucke v. City of Park Hills, 284 F.3d 923, 927 (8th Cir. 2002); Dush v. Appleton Elec. Co., 124 F.3d 957, 962-63 (8th Cir. 1997) (citing F.D.I.C. v. Bell, 106 F.3d 258, 263 (8th Cir. 1997)). However, a "nonmovant" must present more than "scintilla of evidence, and must advance specific facts to create a genuine issue of material fact for trial." Naucke, 284 F.3d at 927; Bell, 106 F.3d at 268 (quoting Rollscreen Co. v. Pella Prods. of St. Louis, Inc., 64 F.3d 1202, 1211 (8th Cir. 1995)). In this regard, the ultimate burden of proof is on Gates to establish that there are no material issues of fact in dispute, and that, as a matter of law, it is entitled to judgment. Oldham v. West, 47 F.3d 985, 988 (8th Cir. 1995) (citing Matsushita

Elec. Inds. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88; Anderson v. Liberty Lobby, Inc., 477 U.S. at 247; Celotex Corp. v. Catrett, 477 U.S. at 322).

It is not the job of this Court at this stage of this litigation to assess or weigh the credibility of witnesses, or to evaluate a weight to assign to their testimony. When there are witnesses whose testimony raise genuine issues of material facts, summary judgment is inappropriate. U.S. v. Dico, Inc., 136 F.3d 572, 579 (8th Cir. 1998); Oldham v. West, 47 F.3d at 988-89.

In order for Tjernagel to make a prima facie case that Gates failed to provide reasonable accommodations in violation of the ADA, she must show that she (1) has a disability within the meaning of the ADA, (2) is a qualified individual, and (3) suffered an adverse employment action as a result of a disability. Huber v. Wal-Mart Stores, Inc., 463 F.3d 480, 482 (8th Cir. 2007); Dakota, Minn. & E.R.R. Co., 327 F.3d 707, 712 (8th Cir. 2003).

The Eighth Circuit in Huber, 463 at 482, quoting from 42 U.S.C. § 12111(9)(B) stated

> The ADA states the scope of reasonable accommodation may include: [j]ob restructuring, part-time or modified work schedules, *reassignment to a vacate position*, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

In order for Tjernagel to establish a prima facie case of disability discrimination under Title I of the ADA, she must show (1) that she has a disability within the meaning of the ADA, (2) she is qualified to perform the essential functions of the job, with or without reasonable accommodation, and (3) she suffered an adverse employment action because of her disability.

McPherson v. O'Reilly Automotive, Inc., _____ F.3d _____ (8th Cir. 2007); Conant v. City of Hibbing, 271 F.3d 782, 784 (8th Cir. 2001).

In order for Tjernagel to establish a prima facie case of retaliation, she must demonstrate (1) that she engaged in a statutorily-protected activity, (2) she suffered an adverse employment action, and (3) a causal connection exists between the two. Gilbert v. Des Moines Area Community College, ____ F.3d _____ (8th Cir. 2007); Heisler v. Metropolitan Council, 339 F.3d 622, 632 (8th Cir. 2003); Scoggins v. Univ. of Minn., 221 F.3d 1042, 1044 (8th Cir. 2000) (ADA). See also, 42 U.S.C. § 12203(a).

This Court, consistent with the pronouncements of the Eighth Circuit Court of Appeals considers that if Tjernagel proves her allegations pursuant to the ADA, those same elements area sufficient to establish claims of discrimination and/or retaliation under the Iowa Civil Rights Act. See, Libel v. Adventurelands of America, Inc., 42 F.3d 1028, (8th Cir. 2007); Fuller v. Iowa Dep't of Human Servs., 576 N.W.2d 324, 329 (Iowa 1998).

In this case, Tjernagel could survive Gates' summary judgment motion by presenting either direct or inferential evidence of discrimination. Libel v. Adventurelands of America, Inc., 42 F.3d at 1034; Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004). If Tjernagel lacks the direct evidence to establish discrimination, and if she creates the requisite inference of unlawful discrimination pursuant to McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), she could avoid summary judgment. She bears the burden of establishing a prima facie case of discrimination (see above), but once she has established that prima facie case, the burden would shift to Gates to articulate legitimate nondiscriminatory reasons for its actions. Libel v. Adventurelands of America, Inc., 42 F.3d at 1034; Kratzer v. Rockwell Collins,

Inc., 398 F.3d 1040, 1044-45 (8th Cir. 2005). If Gates articulates such legitimate nondiscriminatory reason(s), then the burden shifts once again to Tjernagel to show that Gates' justification is merely a pretext. Id.

DISCUSSION

There are no material issues of fact in dispute in this case. While there are certain facts that are disputed between the parties, those facts, in the opinion of the undersigned magistrate judge, do not rise to a material level.

For the purposes of this ruling, the Court considers that Tjernagel's termination by Gates on January 17, 2006 was in fact an adverse employment action. However, the Court is not of the opinion that Tjernagel has established a prima facie case of discrimination, because she has not established as a matter of law that she has a disability within the meaning of the ADA. There is discussion regarding whether Tjernagel has multiple sclerosis (MS), or a Clinically Isolated Syndrome (CIS). Regardless, the evidence does not establish that whether she had MS and/or CIS that either constituted a disability.

The admitted facts indicate that while at one point Tjernagel's doctor in a work report study indicated that she should not work overtime, a subsequent report rescinded that directive.

Also, the facts as present in this record establish that Gates did, in fact, attempt to accommodate Tjernagel by allowing her to sit during her work process, stand when she needed to, take breaks from her production responsibilities, including the ability to leave the area where she was working and go to separate areas in order to take a break. In addition, Gates adjusted cameras that could be used in the production procedures that would allow Tjernagel to see better the job she

was attempting to perform, and it moved pieces of equipment into closer proximity so that Tjernagel would be able to do more work without reaching at great lengths to complete the task.

Notwithstanding these accommodations, it is clear that Tjernagel claims she was unable to perform her jobs. When it became apparent Gates was unwilling, and perhaps unable, to further accommodate Tjernagel, in the face of a restriction on no overtime, it terminated her.

This Court is not satisfied that a diagnosis of MS and/or CIS in and of itself constitutes a disability within the definitions of the ADA. While an individual can certainly be diagnosed with an unfortunate disease or illness or condition, that diagnosis alone does not establish that the person is in fact disabled. Coupled with that consideration is the overlay of Carpal Tunnel Syndrome, which neither party disputes, and which apparently arose as a result of Tjernagel's work for Gates.

There is no suggestion whatsoever in this record, and certainly no evidence to establish that a diagnosis of Carpal Tunnel Syndrome in this case constituted a disabling injury for Tjernagel.

Tjernagel's admissions at the time of her termination on January 17, 2006 that her activities that she says were impacted or affected by her claimed disability included, but are not limited to, fatigue; problems with standing and residual breathing problems; walking with a limp after standing for a period of time; short-term memory losses; numbness and tingling in her arms and legs; and the possibility of limited eyesight fail to establish that any major life activities were impacted at all.

The process of accommodation which is envisioned by the ADA is an interactive endeavor between the employee and the employer. McPherson v. O'Reilly Automotive, Inc., _____

F.3d at _____; Pjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944, 951 (8th Cir. 1998). Because of the confusion that existed between Tjernagel's personal physician and Gates' plant physician, and which confusion extended over a substantial period of time, the Court finds that Gates had a reasonable basis upon which to determine that there were no other accommodations which it could provide, and which would permit Tjernagel to regain her position. Foremost among these was the prohibition by Tjernagel's person physician precluding her from working overtime, and more than 40 hours per week.

Tjernagel has also agreed that during the period of her alleged disability there were no open positions in the SRC, embossing area or in the office. Consistent with the holding in Huber v. Wal-Mart, 486 F.3d at 484, this Court concludes that Gates was not required to provide Tjernagel with some higher status in order to place her in another position, or to reassign Tjernagel to some vacate position, if any existed, if that reassignment would violate a legitimate nondiscriminatory policy of Gates.

The facts as admitted by Tjernagel establish that subsequent to her termination by Gates, she applied for, and obtained new employment. She did not list in her employment application any disabilities, or disabling diseases, and did not advise her current employer that she required accommodations in order to perform the tasks required of her in this new employment.

These facts, coupled with the lack of any real proof that Tjernagel is unable to perform essential life functions on a day-to-day basis, further convinces this Court that while Tjernagel may have an unfortunate disease process that adversely affects her, it has neither disabled her, nor prevented her from working and pursuing her normal life activities. These additional considerations support strongly the granting of Gates' Motion for Summary Judgment.

There is nothing in this record that this Court can find that convinces it that Gates is not entitled to summary judgment as a matter of law on Tjernagel's ADA claims, and her claims under the Iowa Civil Rights Act related to disability claims.

Likewise, her claims for retaliation must also fail. The Court is satisfied that once Tjernagel was terminated, and even though she had started her appeal process within the framework established by Gates, when Gates became aware that Tjernagel's personal physician, belatedly, had issued a new Work Capacity Report, it suspended her requirements under the appeal process.

While Tjernagel may dispute whether her doctor was timely in responding to inquiries from Gates' plant physician regarding her condition and her restrictions, the Court is satisfied that there is nothing in this record that supports a claim that Gates somehow retaliated against Tjernagel for engaging a statutorily-protected activity. Again, the record is devoid of any evidence of such action by Gates.

Tjernagel must establish more than a scintilla of evidence that supports her claim in order to survive summary judgment. She has not done this as it relates to the retaliation claim. In fact, the Court finds that Gates' actions in response to Tjernagel's attempts to regain her employment in the midst of her appeal process were the opposite of any action designed to retaliate against her.

The fact that the Peer Review appeal process ultimately resulted in upholding her termination does not create any inference of retaliation in the opinion of the undersigned magistrate judge.

Based on the Court's consideration of the applicable law, as cited above, and the facts as agreed upon by Tjernagel and Gates, the Gates Corporation d/b/a The Gates Rubber Company is entitled to summary judgment on all claims brought against it by Plaintiff Glena Tjernagel.

IT IS SO ORDERED.

Dated this 20th day of August, 2007.

THOMAS J. SHIELDS
CHIEF U.S. MAGISTRATE JUDGE