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ER19950274

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HUMAN RIGHTS

Sharon Groves,

Charging Party,

**FINDINGS OF FACT,
CONCLUSIONS OF
LAW, AND ORDER**

v.

Fingerhut Corporation,

Respondent.

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on September 30, 1996, at the Isanti County Courthouse, Cambridge, Minnesota. The hearing continued until October 4, 1996. The record in this matter was left open for the submission of memoranda and reply briefs. The hearing record closed on November 27, 1996.

Karen L. Tingstad, Mesaba Law Office, 1539 Grand Avenue, St. Paul, Minnesota 55105, appeared on behalf of Charging Party, Sharon Groves. Thomas J. Conley, Leonard, Street & Deinard, 150 South Fifth Street, Suite 2300, Minneapolis, Minnesota 55402, appeared on behalf of Respondent, Fingerhut Corporation.

Based upon all of the files, records, and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Charging Party was initially hired by Respondent in 1984 to work in the camera stripping department, located in Mora, Minnesota. T. 24-25. The department was newly formed at that time and catalogs were produced through an outside vendor. In November, 1985, Charging Party left her employment with Respondent, due to the lack of work to be performed. T. 25.

2. After working for other employers, Charging Party was rehired by Respondent in August, 1988. The position she filled was that of a Systems Operator at the Mora facility. When Charging Party returned to work for Respondent, the department had

moved to more sophisticated imaging methods. T. 26-27. After some months filling in for other employees on leave, Charging Party was given a permanent position in electronic image assembly. Tr. 27. Larry Butenhoff, A Shift Supervisor, was Charging Party's immediate supervisor in electronic image assembly. In that position, Charging Party scanned images either onto film or into a computer. Once scanned, the images can be manipulated to enhance features or eliminate unwanted aspects.

3. The work performed in the Mora facility involves preparing graphics, including photographs, for use in catalogs and other publications. The work is technical in nature and outcome-oriented. Employee suggestions are solicited by Respondent through a program known as IMPACT. Recognition and bonuses are awarded to employees where the suggestions are adopted by Respondent.

4. In March, 1993, Respondent posted the availability of a position as Color Separation Specialist. T. 31-32. The job description required the applicant to possess a two-year degree in color separation, six to eight years of experience with Crosfield scanning equipment, communication skills, knowledge of the ways in which Macintosh computers interface with high end CEPS (color electronic prepress separations) systems and the limitations of such processes. Ex. 2.

5. Charging Party applied for the position in March, 1993. Ex. 3. She had one year of formal education in color separation and some experience with Crosfield equipment. T. 39-42. At the time she applied for the position, Charging Party did not know what the acronym CEPS stood for. T. 348-349. Respondent hired Jeff Keogh in November, 1993, to fill the Color Separation Specialist position. Keogh had operated scanners since 1984. T. 553 and 584.

6. Soon after Keogh was hired, Charging Party called Keogh and Greg Sather, Plant Manager of the Mora Facility, and asked them what they thought was wrong with a particular scanned image. T. 562. Keogh opined that the "enter white point" was wrong for the scan. *Id.* Charging Party suggested that the program was wrong. T. 566. Sather suggested that the image be rescanned with the white point entered correctly to determine the source of the problem *Id.* The job was given to Eric Hagburg with the instruction to do the scan as he would do any first time scan. T. 62-63 and 568. Hagburg returned with a second proof that was of superior quality. T. 568. Keogh concluded that the enter white point was an important part of a successful scan and announced that to the assembled staff. T. 569. Charging Party looked at the scan and concluded that other changes had been made. T. 64. The day after the scanning issue arose, Butenhoff told Charging Party not to make any color judgments. *Id.* Charging Party understood that the decision to remove her from color judgments came from Sather. T. 66. Charging Party felt that the changes to the scan had been done deliberately to undermine her. *Id.*

7. When Hagburg was given the scanning job, he was aware that the scan was considered to be of poor quality. T. 866. Hagburg believed that his job was to make the scan "come out good." *Id.* To accomplish this result, Hagburg changed the contrast, corrected the color, and edited the scan. T. 866-867. Hagburg was not

instructed by anyone to alter the scan. He was unaware of any dispute between Charging Party and Keogh regarding the scan. T. 872.

8. In August, 1993, Charging Party was outside another employee's cubicle in the office area of the Mora Facility. T. 73. Bob Haugen made a joke about taking a "broom ride" home, and pushed the handle of the broom between Charging Party's legs. *Id.* She turned around and Haugen was laughing. He pinched her on the breast. *Id.* Charging Party left the area immediately and informed two of the women in the desktop area of what had happened. T. 74. The other employee present was concentrating on his work and did not notice anything other than Charging Party leaving rapidly. T. 267. Haugen apologized that afternoon and said his conduct would not be repeated. T. 75.

9. The August 6, 1993 Far Side cartoon calendar page features a tiny desert island with one palm tree and three people sitting on the island. One male sits alone while a man speaks to a woman on the other side of the island. The caption reads, "What? You've met someone else? What are you saying? . . . Oh, my God! It's not what's his name, is it?" Ex. 5. This calendar was located on Charging Party's desk. Several employees made notations on the calendar page to assign identities of other workers to the characters in the cartoon. When Charging Party first saw the annotated calendar, the lone man was labeled "James," the woman was labeled "Sharon" and the speaking man was labeled "Suzy." T. 46-54. Charging Party crossed out her name. Later other names were added, including "Shannon" for the speaking man and "Suzy" again, this time for the woman. The calendar also has a number of names, not including "Sharon," for the added caption "[Name] loses 1st + only girlfriend." Ex. 5. Charging Party took the notations to mean she was being alleged to be in a lesbian relationship. T. 50.

10. In September, 1993, Charging Party sought to attend a class on Quark (a desktop publishing computer program). Mary Kay Nash, C Shift Supervisor, suggested that the class was too basic for Charging Party. Transcript at 92. Following that suggestion, Charging Party declined to attend the training. *Id.* Later, Charging Party was told by another employee with Respondent that the training would be a good opportunity, so Charging Party decided to reapply. *Id.* Sather informed Charging Party that the training list was full. Subsequently, Charging Party overheard Nash speaking to Julie Pearson about being added to the list. T. 93. Charging Party was not subsequently offered Quark training.

11. In November, 1993, Charging Party was promoted to Senior Systems Operator. Under the terms of her employment, Charging Party's promotion was due in September, 1993, when she reached her five-year anniversary with respondent. Promotions were processed at Respondent's office in Minnetonka by the Assistant in Human Resources. T. 537. The system required manual tracking of the anniversary dates of each employee and promotions would not be given until performance reviews were sent out, completed by supervisors, and returned to the Minnetonka office. T. 537-538. Since the process was not automated, problems have arisen in getting promotions processed. *Id.* The Charging Party's promotion to Senior Systems

Operator was processed two months late and she received backpay for the higher pay rate over the period in which her promotion was delayed. The only person identified as having been promoted without serving five years was promoted prior to the adoption of the five year standard. T. 693-694.

12. The motion picture *Basic Instinct* was a common topic of conversation at the Mora Facility due to the sexual overtones and explicit sexual content contained in the film. Male employees on the third shift (C shift) at the Mora Facility began calling Charging Party "Sharon Stone," the name of the female lead in the film. T. 108, 687. The role played by that actress was of a sexually aggressive, bisexual woman who commits several murders. Charging Party took the name calling to mean that she shared those characteristics with the character played by the actress. T. 107-108. One morning, Charging Party arrived at work to find her nametag altered to read "Sharon Stone." T. 108. Sather observed the changed nametag and joked "I see you changed your name." *Id.* No complaint was made to Sather at that time about namecalling or the changed nametag. Charging Party told Butenhoff about the comments and Butenhoff informed Nash (C shift supervisor) that Charging Party complained about those comments. T. 688. Nash informed her subordinate on the next shift that calling Charging Party by anything other than her name was inappropriate. T. 792-793.

13. Charging Party was occasionally called "Sharon Peters" or "Sharing Peters" in reference to a story present in the Mora Facility about a woman having sexual relations with two men. T. 109-110. Cindy Pagerl, a coworker in a different area, began referring to Charging Party as "troublemaker." T. 276. Keogh frequently referred to Charging Party with that term. T. 306. The A shift and C shift supervisors (Butenhoff and Nash) referred to Charging Party as "troublemaker." *Id.* Others in the workplace began referring to Charging Party as "troublemaker." T. 100, 224, 275.

14. In mid-1993, Charging Party submitted two IMPACT suggestions for improving various aspects of the scanning and color correction process. T. 68. In late 1993 and early 1994, Charging Party submitted a larger number of IMPACT suggestions. *Id.* There was no response to these suggestions and Charging Party mentioned the lack of response to Susie Pipken, another employee in the Mora Facility.

15. Pipken mentioned the lack of response to Mark Murray, B shift supervisor, on February 18, 1994. Murray suggested to Pipken that the way to find out if there was anything specific to Charging Party in the treatment of IMPACT suggestions was for Pipken to file the suggestions under her name. T. 302. Pipken relayed Murray's comment and Charging Party took it to mean that Murray was saying that Charging Party should not file IMPACT suggestions under her own name.

16. In early 1994, Charging Party discussed filing a grievance with Butenhoff, who told her that she would have to file through Haugen, the union steward. T. 88. On February 21, 1994. Charging Party filed a grievance that objected to discrimination in training opportunities, the result of the scanning controversy, problems with missing images that "reappear" after Charging Party asks for them, being denied layoff,

discriminatory treatment of Impact suggestions, not being fairly considered for promotion, the broomhandle incident, and notations on a Far Side calendar page. Ex. s 6 and 7, pp. 1-2. Haugen was involved in the grievance as the union steward in all of the grievance issues except those that related to his own conduct. T. 90. Haugen informed Charging Party that Butenhoff was told there would be a lawsuit against Respondent if Charging Party's issues were not addressed. *Id.*

17. Charging Party telephoned Diane Hamann, Respondent's Manager of Human Resource Information Systems and Equal Employment Opportunity, in February, 1994, before a grievance was filed. T. 633-634. They discussed the Haugen conduct; Far Side cartoon notations; alteration of her nametag to read "Sharon Stone;" and being called "Troublemaker," "Sharon Peters," and "Sharing Peters" by coworkers.

18. Charging Party filed a grievance on February 21, 1994, alleging that she had experienced "unfair treatment" over the preceding six months in training opportunities, in the handling of the scanning incident, in the opportunity to take layoff, in the processing of her IMPACT suggestions, in the denial of opportunities for promotion, and being called "troublemaker." Ex. 6. Another claim, redacted from the original grievance, identified namecalling and the broom incident as sexual harassment experienced by Charging Party. T. 107-109.

19. A meeting was held on February 25, 1994, between Charging Party; Terrie Martin, a union representative; Phil Hallstrom Human Resource Manager; Sather; and Hamann. T. 101. Charging Party indicated that inappropriate physical contact was taking place in addition to the broom incident, but she did not identify who was involved. T. 528, Ex. 110. Hallstrom took responsibility for the harassment issues and Sather took responsibility for production issues.

20. Hallstrom interviewed the employee identified as a witness and was told that the employee did not see the alleged conduct. *Id.* Haugen denied having done anything other than joking about who was taking a broom ride home. T. 525, Ex. 110. The only other employee against whom an explicitly sexual Far Side calendar notation was directed is male. T. 270.

21. Sather determined that IMPACT suggestions by Charging Party had been misfiled. T. 828, Ex. 101. The suggestions were found on February 28, 1994. Ex. 101. Interviews and meetings took place throughout March, 1994 on workplace, training, and productivity issues. Ex. 102. On March 11, 1994, Charging Party received a memorandum advising her that her IMPACT suggestions were in the consideration process. Ex. 134. Charging Party received a gift certificate for \$60.00 in company merchandise as an award for the suggestions that were implemented and resulted in cost savings to respondent. *Id.* Sather issued a written apology to Charging Party on April 7, 1994, for misfiling project suggestions. Ex. 105.

22. Hamann, Sather, and Hallstrom concluded that "troublemaker" was being used to refer to Charging Party, cartoons were being posted and written on, IMPACT suggestions had not been properly processed, and Murray had improperly suggested

submitting IMPACT suggestions under another employee's name. T. 642-643, Ex. 106. On April 14, 1994, Sather, Hamann, Hallstrom, Martin, and Charging Party met to discuss the results of the investigation. The issues raised by Charging Party were discussed and the approach to be taken by Respondent to address inappropriate conduct was related. T. 534, Ex. 106. Training would be undertaken over the next two years to address sexual harassment between coworkers, layoff policy would be adjusted, and Murray would receive a reprimand. T. 535. The investigation also concluded that some union activities were taking place on work time and that Charging Party was involved in those activities. Ex. 106.

23. Murray received a written reprimand from Sather for an inappropriate response to an employee concern. Ex. 115.

24. Respondent conducted sexual harassment training for supervisors in May, 1994. The program, entitled *The Invisible Line*, included hostile environment sexual harassment recognition. Ex. 122.

25. After the grievance was investigated, members of the management staff would observe employees eating their lunches in Charging Party's work area. T. 268. On one occasion, management told the employees they should be eating in the lunchroom. The employees were in Charging Party's area because there was no room in the lunchroom. *Id.* On a number of occasions, management staff would look in on Charging Party while passing by. T. 133-134.

26. James Johnson, at that time a Systems Operator with Respondent, provided in-house training in Photoshop (a desktop computer graphics program) to Al Huf and Darlene Wamhoff, two other Systems Operators. T. 93. After Charging Party complained about not being included in that training, she suggested that group training be performed. Respondent then agreed that Charging Party would receive Photoshop training. T. 94. Charging Party's suggestion that group training be conducted was not accepted until Johnson suggested that group training would be needed. *Id.* Charging Party received in-house Photoshop training in March, 1994. T. 95. Charging Party asked to attend outside Photoshop training in April, 1994. Sather denied permission for that training because he did not want to set a precedent of allowing employees to leave work early for training. T. 837-838. Charging Party was working on the PIX workstation at that time and did not need Photoshop training to perform her work. T. 838.

27. Telephones with outside lines were located in a number of sites in the workplace. The telephones were often used by employees for personal calls. On May 15, 1994, Keogh observed Charging Party having a telephone conversation with Susie Pipkin, who had called to inquire as to the volume of work occurring at the Mora Facility. T. 128. On May 16, 1994, several of the telephones in the work area, including the one nearest Charging Party, were removed. On May 16, 1994, Charging Party telephoned in a grievance to her union steward on the removal of the telephone from her work area. Ex. 8.

28. Several different rationales were offered by Respondent to explain the removal of the telephones. The formal response to the grievance indicated that the telephones were no longer needed for equipment diagnostics and they were being used for personal calls. Ex. 108. In response to the grievance about the telephone near Charging Party's work area being removed, all telephones in the work areas outside the supervisor's offices were removed. *Id.*

29. Nash received an assignment for developing the Electronic Entertainment Catalog for use by the Minnetonka office. T. 766. This catalog had images recorded with a digital camera and required putting shadow on background, both of which were new techniques for the Mora Facility. T. 765. Nash decided that James Johnson and Kevin McCarty would do most of the work on the catalog since they worked on Nash's shift and both had computer experience outside the workplace. T. 766-668. Nash informed Huff and Charging Party (the A shift systems operators) that the work was for the catalog being developed and there had been a decision not to involve a large number of people in its development. T. 132 and 769. On several occasions, Johnson or McCarty would work overtime, overlapping with the A shift, and would continue to use the computer that the work was already on. The more powerful computers in the work area were the ones being used by Johnson and McCarty. T. 149-151. On some occasions, this resulted in Charging Party using a computer with inadequate memory for the job she was doing. *Id.* at 151-153.

30. Charging Party filed a grievance on October 20, 1994, objecting to the restriction of catalog work to the C shift and the retention of the more powerful computers by C shift operators to meet the deadline on the catalog. Ex. 11. Nash's reply to the grievance states that limiting work on the catalog was done "for consistency purposes and for lack of time to properly train other employee on this new procedure." *Id.* at 3. Another grievance filed by Charging Party on the same date objected to C shift systems operators working overtime into the A shift period and using the more power computers. Ex. 12. The work complained of was for the Electronic Entertainment Catalog which was on a deadline. The reply from Butenhoff and Nash indicated that the normal policy was to not assign workstations to employees, but to use the workstation that was required by the task. *Id.* at 2.

31. Nash wrote a memorandum to Sather on May 15, 1995 regarding the use of nonapproved shadows in work assigned to Charging Party. Ex. 107. Nash indicated the Charging Party acknowledged that shadows she used were not approved but she and other systems operators were using them anyway. *Id.* The last paragraph of the memorandum stated:

James [Johnson] and Kevin [McCarty] have both relayed to me that they do not want to argue about shadows with Sharon [Charging Party] again and that they are reluctant to even point out errors that Sharon makes, for fear of retaliation. James indicated he would look for another job than deal with Sharon's attitude. I am not sure what has occurred between these employees, but I will monitor the situation closely.

Ex. 107.

32. Some of the photographs to be processed from time to time were female models wearing lingerie. Huf would make a joke of Johnson having worked on such photos by spraying the chair at the workstation occupied by Johnson and asking why the chair was wet. T. 115-116. When Charging Party asked for a rescan by Hagberg, Huf made comments to suggest that the request for a rescan was unnecessary. T. 113. In addition Huf asked Hagberg “why do women have two [sets of] lips,” and provided as an answer, “so they can piss and moan at the same time.” *Id.* Huf would occasionally refer to Charging Party as “Big Momma.” T. 741. Butenhoff spoke to Huf about the “Big Momma” comments and Huf apologized to Charging Party. *Id.* at 742. In 1994, Charging Party has found a number of items in her workstation, including notes bearing statements such as “Help, I’m Talking and I Can’t Shut Up,” or and a matchbook that, when opened, displays a drawing of an infant with what resembles an erect penis. Ex. 9. Charging Party did not inform her supervisor of these items. T. 689-692.

33. Charging Party filed a charge of discrimination with the Department on February 16, 1995. The Department did not make a finding of probable cause in this matter within 180 days of the filing of the charge and the matter was referred by request of the Charging Party to the Office of Administrative Hearings on November 2, 1995, pursuant to Minn. Stat. § 363.071, subd. 1a.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge has jurisdiction over this matter pursuant to Minn. Stat. §§ 14.50 and 363.071 (1994). The Notice of Hearing issued in this matter was proper and the Complainant has complied with all relevant substantive and procedural requirements of law and rule.

2. Pursuant to Minn. R. 1400.7300, subd. 5, Complainant has the burden to show by a preponderance of the evidence that Respondent engaged in discrimination on the basis of gender in violation of Minn. Stat. § 363.03, subd. 1(2)(b).

3. Respondent Fingerhut did not discriminate against the Complainant on the basis of sex due to activities constituting sexual harassment within the meaning of Minn. Stat. § 363.01, subd. 41, as set out in Minn. Stat. § 363.03, subd. 1(2)(b).

4. Respondent Fingerhut did not impose different terms or conditions of employment on Complainant that would constitute discrimination on the basis of sex prohibited by Minn. Stat. § 363.03, subd. 1(2)(b).

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that:

The Complaint brought against Respondent alleging sexual harassment and discrimination in the terms and conditions of employment on the basis of sex and for acts of reprisal against her in violation of Minn. Stat. § 363.03, subd. 1(2)(b) and (c), and subd. 7(1), is hereby DISMISSED.

Dated: 17th day of December, 1996.

STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Transcript, Five Volumes
Gail M. Hinrichs
Kirby A. Kennedy & Associates

MEMORANDUM

Pattern of Discrimination

Charging Party argues that the manner in which Respondent hired a male to the Color Separation Specialist position is evidence of a pattern of discrimination based on sex. The posted job position required experience that the Charging Party did not have and the successful candidate did have. Charging Party “didn’t feel that six to eight years scanning was a requirement to be a color separation specialist.” T. 36. The MHRA does not substitute an employee’s judgment for an employer’s judgment in determining what qualifications a candidate should possess. Where, as here, facially nondiscriminatory job qualifications are posted, a finding of discrimination can only be made if the standards for showing discriminatory impact are demonstrated. Minn. Stat. § 363.03, subd. 11. There has been no such showing in the matter. The hiring of a qualified male over an unqualified female to the position of Color Separation Specialist does not support a finding that a pattern of discrimination existed at Fingerhut.

The manner in which Respondent made training opportunities available to employees is cited by Charging Party as evidence of discrimination. In the Quark training, Charging Party took herself off of the training list, changed her mind and found the list was full. The fact cited as demonstrating discrimination is that another employee

was afforded that training opportunity. The other employee was female, however. There is no evidence of discrimination arising from the Quark training.

In the Photoshop training, the employees who were initially trained in-house on the program were women. While Charging Party's suggestion of group training was not accepted until a male agreed with the suggestion, the male involved was the employee doing the training. The only inference available under these facts is that Respondent was unwilling to impose a training method on an employee who was providing a service over and above the normal duties of his position. Respondent explained the denial of outside training as interfering with the Charging Party's normal work schedule for training in an area not being used by Charging Party at the time. Respondent also indicated that there was concern over setting a precedent over allowing outside training on shift time. The reasons offered for the decision have not been rebutted. There is no evidence of discrimination based on gender arising from the Photoshop training.

The manner in the which IMPACT statements were processed is cited as evidence of discrimination by Respondent. There is no dispute that a supervisor suggested Charging Party submit her suggestions under another name to get them considered. However, the other name mentioned is that of another female employee. If the manner in which IMPACT suggestions were processed is to support an allegation of gender discrimination, the suggested name would have to have been that of a male employee. The record contains ample evidence that there were problems with processing IMPACT suggestions, but no evidence that the problems were based on gender. The only other person identified by Charging Party as having trouble with IMPACT suggestions is male. There is no evidence of discrimination based on gender in the processing of the IMPACT suggestions.

The notations on Charging Party's Far Side calendar are cited as evidence of sexual harassment. The names placed on the calendar and the relationships of the employees named does not support the conclusion that there was a explicit sexual connotation. Rather, the notations appear to be an attempt at humor by linking employees whose status has changed. Shifting loyalties, rather than sex, appears to be the focus of naming the characters. Even assuming that some sexual innuendo was intended, the notations do not rise to the level of conduct that would constitute sexual harassment.

Charging Party's promotion was processed late. There is credible testimony that errors were common in processing promotions. There is no evidence that supports a conclusion that gender discrimination played any part in the processing of the promotion. The only evidence that gender favoritism in promotions occurred is a cryptic note referring to an employee who received a promotion earlier than the five-year period, before the five-year requirement was put into place. Ex. 19. This evidence does not meet the burden required to demonstrate discrimination.

Hostile Environment Discrimination

The names "Sharon Stone," "Sharon Peters," "Sharing Peters, and "Big Momma" are all evidence of the potential for a hostile environment based on sex in the workplace. Sexually oriented jokes, primarily from Huf, were told in the workplace; particularly among males and particularly when supervisors were not present. To constitute a hostile environment that rises to the level of gender discrimination, a member of a protected group must be subjected to unwelcome harassment based on sex that is sufficiently pervasive to create an intimidating, hostile, or offensive environment, and that the employer knew or should have known of the harassment and failed to take appropriate remedial action. Klink v. Ramsey County, 397 N.W.2d 894, 901 (Minn.App. 1986). In this case, when Charging Party reported the namecalling to higher management, an investigation was conducted and some of the namecalling stopped. The only subsequent complaints were to her direct supervisor about the comments made by Huf. Butenhoff offered to speak to Huf about these comments and did so on those occasions when Charging Party did not decide to speak to him herself. At no time did Charging Party communicate to her supervisor that Huf's conduct was no longer tolerable. After a number of complaints to Butenhoff, Huf would apologize and the sexually oriented conduct would subside, only to return after time. The bad conduct did have a negative impact on Charging Party.

Charging Party has relied heavily upon the broom handle incident and the result of the investigation to support the claim of hostile environment. When the incident occurred, Charging Party decided against reporting it to management to avoid having the incident interfere with the friendship between her husband and herself and the perpetrator and his wife. The perpetrator apologized soon after the incident and no such incident has been repeated. When the incident was reported, months later, there was an immediate investigation, all witnesses were interviewed, and each assertion was addressed. There is no evidence to support a hostile environment claim based on the facts surrounding the incident and the subsequent investigation.

The standard for finding a hostile environment actionable under the MHRA is that the harassment create the hostile environment. In this matter, the problem with the workplace is identified by the Charging Party is not sexual banter, but disagreements over the proper way to do the work required at the Mora Facility. See T. 91, 112, 118-119, 124, 132, 139-140, 142-144, 152, 319, 324-325, 328, and 330-331. As discussed above, the Respondent has explained its workplace decisions and Charging Party has not demonstrated that discrimination motivated those decisions. Other employees testified as to the workplace environment and indicated that the hostile atmosphere was due to disagreements about work. T. 161-162. While the sexual comments had a negative impact, the conduct complained of does not meet the standard required under Klink. Moreover, Respondent and its supervisors acted quickly and aggressively to eliminate even remotely sexual behavior in the workplace whenever they became aware of it.

Retaliation

The Charging Party alleges that reprisals were taken against her in response to her attempt to end discrimination at the Mora Facility. The actions identified at the

hearing as reprisals are the removal of the telephone in Charging Party's work area and closer management supervision of Charging Party at work. In her testimony, Charging Party noted that Keogh observed her talking on the telephone with another employee who was not at work, the day prior to the telephones being removed. The Respondent did offer several inconsistent explanations as to why the telephones were removed. These inconsistencies are understandable given the atmosphere of conflict present between workers and management at the Mora Facility.

There was a perception by management that the telephone in Charging Party's area was being used for union activity. This perception was reasonable based on the facts available to Respondent's management. To end the workplace union activity, Respondent removed the telephone it believed was being used to conduct on the job union activity. Charging Party's grievance forced Respondent to act in accordance with its rationale and thereby remove all the other telephones in the building, except for those in supervisors' offices. The requirement that the workers use the supervisors' telephones was intended to create a "chilling effect" on the improper use of the telephones. While Respondent was not entirely truthful in its explanation of its actions, the true motivation was not reprisal for opposing gender discrimination.

The other actions identified as reprisal are incidents of closer management supervision after the grievances were filed. The testimony offered to support the claim is completely lacking in facts to support a conclusion that the supervision was intended to demonstrate hostility or retaliate for any action by Charging Party. With the filing of a grievance alleging serious misconduct in the workplace, an employer may create a dilemma for the employer. To fail to more closely scrutinize its employee's conduct would demonstrate a disregard for that conduct. Closer scrutiny, on the other hand, would constitute reprisal. There is no question that some employer responses can constitute retaliation. Here, supervisors "looked in" at Charging Party's work station and began eating lunch in the work area. These actions are prudent responses to allegations of harassment in the workplace. This conduct, without more, does constitute reprisal.

Charging Party suggested that the dismissal at the hearing on the issue of retaliation be reconsidered. To constitute retaliation, an employer must take adverse action against an employee for opposition to a discriminatory practice or participation in the MHRA process, and the action must be motivated by the employee's protected conduct. Hubbard v. United Press International, Inc., 330 N.W.2d 428, 444 (Minn. 1983). The evidence presented in the Charging Party's case-in-chief showed Charging Party's grievances were promptly and adequately investigated, that little could be identified as adverse action experienced by Charging Party after her grievances were raised, and there is no evidence regarding improper motivation of any subsequent action. Without evidence substantiating the claim of retaliation in the Charging Party's case, a dismissal was appropriate.

Time-Barred Claims

The prehearing ruling that certain claims were time-barred was challenged in Charging Party's posthearing brief. Such a challenge is untimely and cannot be granted. The evidence brought out at the hearing does not alter the underlying rationale for excluding those issues. None of the issues raised in the grievance process remained unaddressed. Charging Party's Impact suggestions were addressed, the term "troublemaker" is not sexual harassment, and the sexual comments do not rise to the level of creating a hostile environment.

A meeting was held between Charging Party and Respondent's management staff on April 14, 1994. Charging Party testified that she understood the result to be that Respondent was "done with the grievance at that time." T. 129. Charging Party went on to detail her efforts to get the union to investigate the early promotion allegation and the scanner incident. Both of those issues were the subject of testimony and are expressly found to be not acts of discrimination. Since the union did not ultimately take up Charging Party's issues, there is no basis for extending the equitable tolling of the express statutory limitation after the April 14, 1994 meeting. Whether time-barred or examined on the merits, the outcome is the same.

Conclusion

Respondent appears to be genuinely dedicated to combating sexual harassment in its workplace and acts quickly to eliminate it when it occurs. Charging Party is a talented, dedicated worker, but seems unable to accept anything less than complete agreement with and acceptance of her ideas. She sees conspiracies and sexual discrimination behind every minor slight and attempted humor.

Charging Party has experienced a great deal of conflict in her employment with Respondent. There are several reasons for this, but none of those reasons are discrimination on the basis of gender or reprisal for opposing any discriminatory practice. Therefore, the Charging Party's Complaint under the MHRA must be DISMISSED.

S.M.M.