

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

Sandra J. Wymore,

Complainant,

ORDER ON MOTION
FOR SUMMARY JUDGMENT

vs.

Empak, Inc. and John Garland,

Respondents.

On March 13, 1995, the Respondents filed a Motion for Summary Judgment. The Complainant filed a response to the motion on March 23, 1995. On March 29, 1995, the Respondents filed a reply.

Donna L. Roback, Esq. and John J. Steffenhagen, Esq., of the firm of Larkin, Hoffman, Daly & Lindgren, Ltd., 1500 Norwest Financial Center, 7900 Xerxes Avenue South, Bloomington, Minnesota 55431, represented the Respondents. Marcia S. Rowland, Esq., of the firm of Standke, Greene & Greenstein, Ltd., 17717 Highway 7, Minnetonka, Minnesota 55345, represented the Complainant.

Based upon the written arguments submitted and all of the filings in this case and for the reasons set out in the Memorandum which follows:

IT IS HEREBY ORDERED: The Respondents' Motion for Summary Judgment is DENIED.

Dated this 5th of April, 1995

GEORGE A. BECK
Administrative Law Judge

MEMORANDUM

The Respondents have moved for a summary judgment in their favor. Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955); Louwagie v. Witco Chemical Corp., 378 N.W.2d 63, 66 (Minn. App. 1985). Summary disposition is the administrative equivalent to summary judgment and the same standards apply. Minn. Rule 1400.5500K, Minn. Rule 1400.6600. The evidence must be viewed in a light most favorable to the nonmoving party. Hansen v. City of St. Paul, 298 Minn. 205, 214 N.W.2d 346 (1974). To successfully resist a motion for summary judgment, the nonmoving party must show that there are specific facts in dispute which have a bearing on the outcome of the case. Hunt v. IBM Mid America Employees Federal Credit Union, 384 N.W.2d 853, 855 (Minn. 1986). Island Chateau v. Minnesota Department of Public Welfare, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984). General averments are not enough to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05. Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1988). However, summary judgment is not to be used as a substitute for trial where issues of fact need to be determined. Ahlm v. Rooney, 274 Minn. 259, 143 N.W.2d 65 (1966).

Three charges have been consolidated for hearing in this case. First, a claim that Complainant was harassed when a temporary employee kissed her; secondly, a claim that a supervisor, John Garland, aided and abetted harassment through three comments with sexual overtones; and third, a claim that Empak retaliated against the Charging Party in relation to accrued sick time and a request for time off.

In regard to the first charge, the Respondents argue that the actions of the temporary employee in question cannot be imputed to Empak because it lacked any notice of a problem before the kissing incident. It points out that after the kissing incident, the temporary employee was required to leave the premises. The employer notes that it is not required to maintain a pristine work environment and states that under Fore v. Health Dimensions, 509 N.W.2d 557, 561 (Minn. Ct. App. 1993), a plaintiff must establish that the employer knew or should have known of any harassment. The Respondents argue that under Fore an employer is not strictly liable for the acts of harassment perpetrated by employees, even if the employee is a supervisor. 509 N.W.2d at 560.

The Complainant has demonstrated a genuine issue of material fact in regard to the incident with the temporary employee. The Complainant did speak to her supervisor prior to the kissing incident about the temporary employee. There is a significant conflict in the evidence, however, as to what was said in the course of this conversation. According to the Complainant, she advised Kevin Shanahan that the temporary employee was making her feel uncomfortable and that Mr. Shanahan merely laughed and did not inquire about any specifics. On the other hand, the supervisor testified that the Charging Party told him that the temporary employee was "acting creepy" and that after he asked for specifics the Charging Party told him to forget about it. This constitutes specific facts in dispute which may have a bearing on the outcome of the case. Additionally, the Complainant argues that the employer had prior knowledge of improper behavior on the part of other temporary employees, including one that followed the Charging Party around while intoxicated. The parties disagree as to whether or not this prior conduct is relevant to the present allegation of sexual harassment. Accordingly, summary judgment is inappropriate.

The employer also argues that summary judgment should be granted on the reprisal charge because the charge was not filed between the issuance of the mistaken sick leave amount and its subsequent correction. The employer therefore argues that if it had truly wished to retaliate against the Charging Party, it would simply have reduced or eliminated her accrued time in the first instance. However, the fact that the charge was filed prior to the initial mistake does not preclude the possibility of reprisal as a matter of law. The Charging Party alleges that she was promised a pro rata accrual of sick leave based upon prior full-time employment when Empak required all employees to move to full-time or lose their benefits and that Empak then reneged on that promise. There is a factual conflict on this point.

The Respondents also argue that the employer's denial of time off for the Charging Party cannot constitute reprisal as a matter of law because she had no time off accrued, either by way of sick leave or vacation, at the time of the request. The employer urges that the court may not substitute its own business judgment for that exercised by Mr. Shanahan. However, the Charging Party was requesting time off without pay in order to care for her children, a request which was allegedly granted to other employees. The Complainant states that part-time employees did not have sick leave or vacation benefits and therefore when they took time off it was always time off without pay. The Charging Party has demonstrated factual conflicts that must be resolved in regard to the issue of reprisal.

Finally, the employer argues that Mr. Garland's statements cannot be imputed to it because they were not reported to Empak. The Charging Party states that she did not report these incidents because she believed, based upon prior conduct, that the employer would not do anything about it. Although employees are generally expected to report incidents of discrimination before an employer is expected to respond, the situation is not quite as clear where the person to whom the report is made is involved in the harassment or has demonstrated a lack of concern about it. McNabb v. Cub Foods, 352 N.W.2d 378, 383 (Minn. 1984); Heaser v. Lerch, Bates & Associates, 467 N.W.2d 833, 835 (Minn. Ct. App. 1991). Jenson v. Eveleth Taconite Company, 824 F. Supp. 847 (D. Minn. 1993). In this case, the person making the statements was the supervisor of the Charging Party's supervisor.

The Respondents also argue that even if the conduct alleged by the Complainant on Mr. Garland's part is proved, it does not constitute harassment. However, because the statute defining sexual harassment includes verbal or physical contact or communication of a sexual nature when the communication substantially interferes with a person's employment or creates an intimidating hostile or offensive environment, the statements must be examined in the context of that statutory standard. Accordingly, physical contact would not be the only action to be considered. The Complainant has also met its burden to demonstrate specific facts in dispute concerning the statements allegedly made by Mr. Garland. It does not appear that the relevant case law can be applied to the situation without the determination of what actually happened.

G.A.B.