

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

Sandra J. Wymore,

Complainant,

vs.

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

Empak, Inc., and John Garland,

Respondents.

The above-entitled matter came on for hearing before Administrative Law Judge George A. Beck at 9:30 a.m. on April 25, 1995, at the Office of Administrative Hearings, 100 Washington Avenue South, in the city of Minneapolis, Minnesota. The hearing continued on four subsequent days and concluded on May 2, 1995. The record remained open through June 26, 1995, when the last written brief was filed.

Marsha S. Rowland, Esq., Standke, Greene & Greenstein, Ltd., 17717 Highway 7, Minnetonka, Minnesota 55345, appeared on behalf of the Charging Party. 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 55431-1194, appeared representing the Respondents.

NOTICE

Pursuant to Minn. Stat. § 363.071, subs. 2 and 3, this Order is the final decision in this case. Under Minn. Stat. § 363.072, the Commissioner of the Department of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. §§ 14.63 through 14.69.

STATEMENT OF ISSUE

The issues to be determined in this proceeding are:

(1) Whether the Respondents discriminated against the Complainant in the terms and conditions of her employment because of her sex,

- (2) Whether the Respondents engaged in an illegal reprisal against the Complainant,
- (3) Whether the Complainant was constructively discharged from her position, and
- (4) If so, what damages or other relief, if any, is the Complainant entitled to receive.

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

FINDINGS OF FACT

1. Sandra J. Wymore (“Wymore” or “Complainant”) is a 32 year-old woman who is married and resides with her husband and two sons in Watertown, Minnesota. Ms. Wymore left high school during the 11th grade and got her GED Certificate in 1981 or 1982. She married at age 17.

2. After high school, the Complainant and her family moved to Texas where she worked as a cashier in Lubbock, Texas, at several retail stores.

3. In late 1987, Ms. Wymore and her family returned to Minnesota. She began looking for work and learned from a friend of her sister’s of job openings at Empak’s Waconia plant. Ms. Wymore and her sister met an Empak foreman named Charlie at a bar to discuss employment. She was hired as a result of the interview and began work the next day on March 13, 1988.

4. The Complainant began her employment on the production floor at the Waconia plant as a packager. Empak is a plastic injection molding company that produces plastic products. T. 515. The Waconia plant made cassette holders and compact disc holders. Empak has approximately 550 employees. T. 516.

5. On one occasion while she was working at the Waconia Plant, her supervisor, Charlie, and another employee asked her what kind of bra she had on and if her underwear matched her bra. T. 77. At a Christmas party in December of 1989, Brian Liepard, a subsequent supervisor, said to the Complainant, “Let’s go fuck.” T. 78. After this incident, Ms. Wymore believed that Mr. Liepard was assigning her unpleasant tasks outside of her job description. She then complained to the Director of Human Resources about his comment at the party.

6. The Complainant later asked the Human Resources Director if she could transfer to Empak’s Chanhassen plant so that she wouldn’t have to work for Mr. Liepard. In September of 1990, Ms. Wymore was allowed to transfer to the Chanhassen plant, which is approximately ten miles further from her home than the Waconia plant. Ex. M, Ex. N. She continued to work as a packager. The Chanhassen plant makes plastic shampoo bottles. She started working full-time at Chanhassen, but then later went to half-time.

7. Ms. Wymore’s performance evaluations at the Waconia plant were all good with the exception of her last one by Brian Liepard in April of 1990. Ex. D.

8. Ms. Wymore’s employee performance evaluations while she was employed at the Chanhassen plant were all rated at either “Meets Expectations” or “Exceeds Expectations”

except for a review following a failure to report an injury to herself and a failure to comply with lifting limits set by her doctor. Ex. H, Ex. O, Ex. 74, Ex. 75.

9. The Empak Chanhassen plant regularly employed approximately four or five day laborers from a temporary agency each day. T. 672. Empak does not screen the temporary workers, but relies on the temporary employment agency to do that. T. 520. These workers sometimes used foul language in the plant and occasionally one would appear for work with the smell of alcohol on their breath. T. 368, 690, 1044. On one occasion, Ms. Wymore complained to her supervisor, Kevin Shannahan, about a temporary worker who smelled of alcohol, was slurring his words, and was unable to work effectively. The temporary worker found out that Ms. Wymore was attempting to have him removed and followed her around the plant. At that point, Ms. Wymore complained again and told a supervisor that either they would have to remove the temporary or she would leave. The temporary was then removed from the plant.

10. On Sunday, April 25, 1993, Ms. Wymore was working from 6:00 a.m. to 6:00 p.m. When she arrived, she assisted lead worker Barb Johnson in putting the temporary workers in the right positions. Barb Johnson then asked Ms. Wymore to check on a temporary worker who was doing labels. As she stood beside this worker, he said to her, "You smell of a good aroma" and "I think you are a beautiful lady". Ms. Wymore replied, "Thank you" and then went to Barb Johnson and co-worker Mary Schwartz and told them what the temporary worker had said. T. 104.

11. Later, when the temporary employee returned from a break, he walked over to the press that the Complainant was working at and smiled at her while standing about six inches away. Ms. Wymore directed him to the work station where he was supposed to be working. The temporary worker then grabbed her arm, rubbed on it, and squeezed it and brushed his hand along her cheek. T. 108-109. He then smiled at Ms. Wymore and left for his work station. On her first break, Ms. Wymore told several fellow employees about this incident. T. 109.

12. At the second break, at approximately 11:30 a.m., Ms. Wymore went to relieve the temporary worker so that he could take a break because no one else had relieved him. The temporary worker gave Ms. Wymore what she believed was a "weird" smile and proceeded to take his break. Ms. Wymore then took her break and told her co-workers about the smile. Ms. Wymore also talked to Mr. Shannahan about the temporary worker. She told him that the temporary worker was acting weird or creepy. T. 674. Mr. Shannahan asked her what she meant and Ms. Wymore said, "Oh, just forget it." T. 675.

13. After the break, Barb Johnson asked Ms. Wymore to check on the temporary worker to make sure that everything was O.K. She proceeded to his work station. As Ms. Wymore was bending over a box and putting a bag into it, the temporary worker put his hand on her shoulder and asked her if she was sick. She replied, "No, I'm just hot." The temporary worker said, "Are you hot like angry?" Ms. Wymore then waved her hands in front of her face to show that she was hot in that way. The temporary worker smiled at her, grabbed her chin and brushed his hand on her face and returned to his press. T. 115. Ms. Wymore then reported this occurrence to Barb Johnson and Mary Schwartz.

14. The last break of the shift occurred about 2:35 p.m. and the Complainant decided to give the temporary worker a break again since she had already done it the first two times. She approached his work station and told him that he could go on break. The temporary worker stood up and as the Complainant was getting ready to sit down, the temporary worker moved

behind her, grabbed both of her shoulders and pulled her against him and kissed the back of her neck. The Complainant moved to separate them with her elbow and told him, "You can't do that in here, you can't kiss people in this plant." The temporary worker then grabbed her and kissed her on the cheek. He was smiling during the incident. The temporary worker then walked off towards the break room. T. 116-117.

15. Ms. Wymore then called Barb Johnson over and told her that the temporary worker had just kissed her. Barb Johnson told her to wait while she got their supervisor, Kevin Shannahan. Ms. Shannahan returned with Barb Johnson and asked the Complainant if the temporary worker had kissed her and Complainant replied, "Yes he did." Mr. Shannahan then said, "Well, I'll take care of it." T. 117-118, 677.

16. Barb Johnson then replaced Ms. Wymore at the work station. The Complainant was shaking and was crying due to the incident. T. 789. She proceeded to the bathroom with another employee, Deb Kahle. Ms. Kahle tried to calm her down. T. 119, 898. The Complainant told Ms. Kahle and Barb Johnson, who later joined her, that she had been stalked by a man in Texas who had later murdered a neighbor. T. 774, 879. Ms. Johnson asked Ms. Wymore if she wanted to go home, but she said no. T. 790. At Ms. Wymore's request, Ms. Kahle locked some of the doors at the rear of the plant and went out to check the Complainant's car and locked it. T. 880.

17. A co-worker, Kip Veith, walked past Ms. Wymore on her way to the bathroom and laughingly told her "I heard what happened to you". Ms. Wymore told him that it was not funny. Later that afternoon, Mr. Veith told Ms. Wymore he was really sorry for what he had said. He said he didn't realize how upset the Complainant was. T. 119, 292.

18. When Ms. Wymore returned to her work station, Mr. Shannahan told her that the temporary employee had admitted kissing her and that he was being picked up by the agency. T. 679. Mr. Shannahan told the temporary that he could no longer work at Empak and called the temporary agency to pick him up. T. 678. Mr. Shannahan advised the agency that this person could not return to Empak. Ex. P, Ex. Q.

19. Sometime between 3:30 and 4:00 p.m., another temporary worker came up to Ms. Wymore and told her that the temporary worker who had kissed her had disappeared and that Mr. Shannahan did not know where he was. T. 122, 283. The temporary worker had left the Empak premises before the temporary agency showed up to give him a ride. Ms. Wymore was concerned that he might be hiding in the plant. T. 123. She asked Mr. Shannahan to let her know when the temporary worker was located.

20. At one point, Mr. Shannahan told the Complainant that the temporary worker was probably going to be hiding in her car when she went home. T. 122, 286. At the end of the day, Debbie Kahle walked Ms. Wymore to her car without incident while Mr. Shannahan watched. T. 124, 685, 881. Mr. Shannahan filed a written report with Human Resources about the incident on April 25, 1995. Ex. P, T. 681.

21. The next morning, Ms. Wymore called the Empak Human Resources Department to report the incident. Before the Human Resources people called her back, she also talked to her attorney. T. 126. Henny Schoeller of the Human Resources Department called her back. Ms. Wymore told her that the temporary worker had grabbed her and kissed her. In the course of discussing the incident, Ms. Schoeller told the Complainant that her daughter had been in another country and said that if a woman smiled at a man in that country she was considered fair game.

T. 127. Ms. Wymore then became upset and told Ms. Schoeller that temporary workers should know that a smile is just a smile.

22. Ms. Wymore told Ms. Schoeller that she had to use her elbow to push the temporary worker off. Ms. Schoeller commented that she shouldn't have done that because it might be assault. T. 128. They discussed whether Empak should have some type of screening for temporary workers. Ms. Wymore asked Ms. Schoeller to let her know where this person was and what his name was. Ex. P, T. 130. No one at Empak ever gave her this information however. T. 131. Ms. Schoeller was later reprimanded by Empak for her comments to Complainant about her daughter's experiences in another country. Ex. MM.

23. Ms. Schoeller interviewed Ms. Wymore about the incident on Ms. Wymore's next scheduled work day. She later told Ms. Wymore that the temporary worker would not be returning to Empak and that the temporary agency was told to brief their workers on appropriate behavior concerning female employees. She also told the Complainant that she had advised Mr. Shannahan that he should not discuss such incidents with other employees on the shift. Ex. 80.

24. The Complainant filed a discrimination charge because of the incident with the Minnesota Department of Human Rights on July 15, 1993. Ex. KK. After this, Ms. Wymore felt that her co-workers weren't talking to her as much. T. 136. However, her co-workers were not aware that she had filed a charge until after she left Empak. T. 768, 860, 1097.

25. In a letter dated June 22, 1993, Empak advised Ms. Wymore that the eligibility threshold for employee benefits, including medical coverage, was being increased from 20 hours per week to 40 hours per week effective November 1, 1993. Ex. 37. The letter gave Ms. Wymore the option of being employed full-time or remaining part-time and paying for the benefits under COBRA guidelines. This meant that Ms. Wymore would have to begin work full-time in order to keep her health benefits. T. 138. The elimination of benefits for part-time workers was done for all employees of the company in order to save money. T. 658. At a meeting to discuss these changes, Ms. Wymore asked Vicki DeVore if she might be able to receive some credit for prior full-time work in the calculation of accumulated vacation time. Ms. DeVore told her to come to the Personnel Office to discuss it. T. 140, 303. The Complainant later talked to another employee in the Human Resources Department who indicated that she would need to look at some things and that the Complainant should come back in a few days and talk to her. When the Complainant returned to the Human Resources Office, the employee she had talked to was no longer there and Maureen Grimes told her that she knew nothing about prorating her vacation time. Ms. Wymore became angry and threatened to quit. T. 141. Ms. Wymore did become a full-time employee on October 14, 1993. Ex. 40.

26. On January 6, 1994, Ms. Wymore received a paycheck stub which indicated that she had a sick leave balance of 40 hours. Ex. S. Ms. Wymore assumed that she was being given some credit for prior full-time employment. However, she received a written memo dated January 7, 1994, stating that there had been an error in the sick time calculation on her paycheck and that the correct sick time hours as of January 1, 1994, was 6.67 hours. Ex. T. Her next paycheck stub was January 13, 1994, and the stub indicated a sick leave balance of 7.97 hours. Ex. S, p. 2. The mistake on sick leave was made for all former part-time employees. T. 551. Other employees in a similar situation had the same reduction in sick leave. T. 919, Ex. 153, Ex. 154.

27. On November 15, 1993, Empak conducted a sexual harassment training class for its employees, taught by an attorney. T. 142. One of the seven examples used in the training involved an employee named Sandy. Ex. 152. The Complainant felt that everyone was looking at her when this example was discussed. T. 142.

28. At the beginning of January of 1994, Ms. Wymore asked Kevin Shannahan if she could have three days off at the end of the month because she did not have day care for her kids. At the time her husband was out of the country. Because she had no sick leave or vacation leave, Ms. Wymore was requesting time off without pay. T. 312. Mr. Shannahan told her that she had already been taking too many days off, but did not state whether or not she would be able to take the three days off. Ms. Wymore asked Mr. Shannahan about it again about a week later and he told that within the next three weeks she should be able to find a sitter. Mr. Shannahan told her that he could not allow her to take that many days off. T. 148.

29. On February 11, 1994, the Complainant submitted a written request for taking February 26 and 27, 1994, off as unpaid personal time. The request was also disapproved by Kevin Shannahan and the decision verbally communicated to Ms. Wymore on February 16, 1994. Ex. V. The complainant's attendance records with Empak did not indicate excessive absences. Ex. L. However, she had a number of days off without pay at the end of 1993 and beginning of 1994. Ex. 135, T. 913.

30. The Empak plants run 24 hours a day because it is expensive to shut down and start up the equipment. Supervisors are given discretion in granting leave in order to make sure that the machines will be attended. T. 554, 692.

31. At the beginning of March of 1994, Ms. Wymore gave notice to Empak that she would be leaving employment with Empak on March 16, 1994. She told her employer she was leaving because her husband was going to be doing a lot of traveling and she was going with him. T. 246, 830. During an exit interview with Mr. Shannahan, the Complainant asked if he would rehire her. Mr. Shannahan replied, "Yes." However, after he talked to the Human Resources Department, Mr. Shannahan indicated on the leave form that he would not rehire Ms. Wymore. The form, which Ms. Wymore signed, stated that her resignation was voluntary. Ex. Y.

32. When she left Empak on March 16, 1994, Ms. Wymore had an average gross earnings per week of \$401.28. Ex. EE. Ms. Wymore elected to continue family medical, dental and life insurance coverage under COBRA at a total cost of \$392.46 per month. This monthly cost is \$294.96 per month more than her monthly costs while she was employed at Empak. Ex. FF.

33. After she left employment at Empak, Inc., Ms. Wymore did not apply for other work because of concerns about working with men and trusting co-employees. T. 165-166. She was also concerned that if she accepted another job she would have to wait a year before she would have insurance. T. 166.

34. Prior to her employment with Empak, the Complainant was diagnosed with ulcerative colitis which is an inflammatory disease which causes ulceration of the inner lining of the colon and rectum. T. 337, Ex. HH. While she was working at Empak, Ms. Wymore generally was able to control the ulcerative colitis with medication, but would occasionally have flare-ups of the disease. Ex. II.

35. Empak, Inc. had a written policy on sexual harassment during 1993 that provided that employees would be provided with a working environment free from offensive behaviors and harassment of any kind. The policy defined sexual harassment and advised employees who felt they had been subjected to inappropriate behavior to promptly report it to either their immediate supervisor or the person to whom the supervisor reports or the Director of Human Resources. The policy advised employees that disciplinary action up to and including termination would be taken for inappropriate behavior by an employee. Ex. CC.

36. At the Respondents' sexual harassment and discrimination training seminar in November of 1993, (Ex. R), an updated policy on sexual harassment and inappropriate conduct was handed out. Ex. DD. Sexual harassment was again defined and prohibited conduct was specified. The policy directed employees with knowledge of a violation to report it to the employee's immediate supervisor, the immediate supervisor's supervisor, or anyone else in a position of authority at the company. Ex DD. The sexual harassment policy was distributed to each employee in an information packet provided to all employees. Ex. 118, 119. Empak also has written policies regarding affirmative action and equal opportunity, which prohibits discrimination. Ex. 16, 17, T. 526.

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

CONCLUSIONS

1. The Administrative Law Judge has jurisdiction in this matter under Minn. Stat. §§ 14.50 and 363.071.
2. The Notice of and Order for Hearing in this matter was proper and fulfilled all relevant substantive and procedural requirements of law or rule.
3. At the relevant times, Respondent was an employer as defined in Minn. Stat. § 363.071, subd. 17, and the Complainant was an employee within the meaning of Minn. Stat. § 363.01, subd. 16.
4. Under Minn. Stat. § 363.03, subd. 1(2)(c), it is an unlawful employment practice for an employer to discriminate against a person because of sex with respect to the terms, conditions or privileges of employment. Discrimination based upon sex includes sexual harassment. Minn. Stat. § 363.01, subd. 14.
5. Under Minn. Stat. § 363.01, subd. 41, sexual harassment includes unwelcome sexual advances, requests for sexual favors, sexually-motivated contact, or other verbal or physical conduct or communication of a sexual nature if the conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile, or offensive employment environment and the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action. Minn. Stat. § 363.01, subd. 41(3).
6. The Complainant was the subject of sexually-motivated contact and physical conduct of a sexual nature which created an intimidating employment environment.

7. That the Complainant has not established a *prima facie* case of sex discrimination as to the Respondents because she has not established that the employer knew or should have known of the harassment and failed to take timely and appropriate action.

8. That the Respondent Empak has shown by a preponderance of the evidence that it took timely and appropriate action once it learned of the existence of the harassment.

9. Under Minn. Stat. § 363.07, subd. 7, it is an unfair discriminatory practice for any employer to intentionally engage in a reprisal against a person who has filed a charge under Chapter 363. A reprisal includes any form of intimidation, retaliation, or harassment, including a departure from any customary employment practice.

10. That the Complainant has failed to prove that either Respondent engaged in a reprisal against her.

11. That the Complainant has not proved that she was constructively discharged from her employment with Empak.

12. That the reasons for the foregoing Conclusions of Law are set out in the Memorandum which follows and which is incorporated into these Conclusions of Law by reference.

13. That any Finding of Fact which is more appropriately classified as a Conclusion of Law is hereby adopted as such.

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

ORDER

IT IS HEREBY ORDERED that:

1. This matter is DISMISSED WITH PREJUDICE.
2. That the following exhibits in this case shall be sealed and not public: Exs. A through K, X, Y, II, MM, NN, 74, 75, 135, 149, 153 and 154.
3. That all of the testimony referenced in Mr. Steffenhagen's letter of June 2, 1995 (attached hereto) is stricken from the record, but shall remain in the record as an offer of proof.

Dated this 25th of July, 1995

/s/

GEORGE A. BECK
Administrative Law Judge

Reported: Kirby A. Kennedy & Associates
Transcript prepared.

MEMORANDUM

The Minnesota Human Rights Act provides that it is an unfair employment practice for an employer because of sex to discharge an employee or to discriminate against an employee with respect to terms, conditions, facilities, or privileges of employment. Minn. Stat. § 363.03, subd. 1(2)(b) and (c). Discrimination based on sex is defined to include sexual harassment. Sexual harassment, in turn, is defined to include physical conduct of a sexual nature when the conduct has the purpose or effect of substantially interfering with an individual's employment or creating an intimidating, hostile or offensive employment environment. However, the statute also requires that the Complainant prove that the employer knew or should have known of the existence of the harassment and failed to take timely and appropriate action.

Discrimination charges under the Minnesota Human Rights Act are considered under the analysis first set forth in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973). This analysis has been adopted by the Minnesota Supreme Court. *Danz v. Jones*, 263 N.W.2d 395, 399 (Minn. 1978); *Sigurdson v. Isanti County*, 386 N.W.2d 715, 719 (Minn. 1986). The Complainant must first establish a *prima facie* case of disparate treatment based upon a statutorily prohibited discriminatory factor. Once a *prima facie* case is established, a presumption arises that the respondent unlawfully discriminated against the complainant. The burden of producing evidence then shifts to the respondent, who is required to articulate a legitimate, nondiscriminatory reason for his treatment of the complainant. If the respondent establishes a legitimate, nondiscriminatory reason, the burden of production shifts back to the complainant to demonstrate that the respondent's claimed reasons were pretextual. *McDonnell Douglas*, 411 U.S. 802-04. *Hubbard v. United Press International, Inc.*, 330 N.W.2d 428 (Minn. 1983). The burden of proof at all times remains with the complainant. *Lamb vs. Village of Bagley*, 310 N.W.2d 508, 510 (Minn. 1981); *St. Mary's Honor Center v. Hicks*, ___ U.S. ___ 113 Sup. Ct. 2742, 2753-54 (1993).

Additionally, the Minnesota courts have recognized an action under the Minnesota Human Rights Act for the creation of a hostile work environment related to a person's sex. *Continental Can v. State*, 297 N.W.2d 241 (Minn. 1980). The federal courts have recognized a similar claim for relief under Title VII of the U.S. Civil Rights Act of 1974. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. ___, 106 S.Ct. 2399, 2406 (1986). Five elements are necessary to establish a *prima facie* case of hostile work environment related to sex: (1) The employee must belong to a protected group; (2) the employee must be subjected to unwelcome sexual harassment; (3) the employee must be subjected to harassment on the basis of sex; (4) the unwelcome harassment must be intended to or in fact actually substantially interfere with the employee's employment or create an intimidating, hostile or offensive working environment; and (5) the employer must be liable based on knowledge or imputed knowledge of the harassment and failure to take remedial action. *Johnson v. Ramsey County*, 424 N.W.2d 800, 808 (Minn. Ct. App. 1988); *Kling v. Ramsey Co.*, 397 N.W.2d 894, 901 (Minn. Ct. App. 1986) pet. for rev. denied (Minn. Feb. 13, 1987).

The Complainant has established a *prima facie* case of discrimination as to the first four elements since it is clear that she is a member of a protected group by virtue of her sex, she was kissed in the workplace by a fellow employee and that conduct was unwelcome. Additionally, the incident clearly interfered with the Complainant's employment and created an intimidating work environment for her. Even though the employee was a temporary employee, it is clear that Respondent Empak is responsible for his conduct in the workplace as it acknowledges in its harassment policies. Ex. CC. The record shows that Empak had authority to direct and control

the actions of temporary workers at its plant. To permit it to evade responsibility for their actions would negate the protections of the Minnesota Human Rights Act.

However, the Complainant failed to show that the employer knew or should have known of the existence of the harassment and failed to take timely and appropriate action. The main incident cited by the Complainant occurred on April 25, 1994, when a temporary worker kissed the Complainant. The Complainant did not establish that the employer had any knowledge of a problem with this worker prior to the kissing incident. Although the temporary worker had been acting in an unusual manner that day prior to the incident, the preponderance of the evidence indicates that the Complainant had not communicated to her supervisor that she was being harassed or even that there might be a problem with inappropriate behavior. The record indicates that Ms. Wymore told co-workers about his comments and actions during the morning prior to the 11:30 a.m. break. The temporary worker had told her that she smelled "of a good aroma" and had grabbed her arm and brushed his hand against her cheek.

At or near the noon break, she did tell her supervisor, Mr. Shannahan, that the temporary worker was acting weird or creepy. However, when Mr. Shannahan asked her what she meant, Ms. Wymore said, "Oh, just forget it." The Complainant did testify that she had advised her supervisor more explicitly about what was occurring prior to the kissing incident. However, she testified that co-workers were present when this occurred and those co-workers had no recollection of Ms. Wymore complaining about the conduct of the temporary worker to Mr. Shannahan. The testimony of Mr. Shannahan and the co-workers is therefore credited over that of Complainant in this respect. When she did mention the temporary worker to Mr. Shannahan, she stated that he was acting weird or creepy. Mr. Shannahan then properly inquired about what she meant, but the Complainant told him to forget about it.

The record indicates that Empak did take reasonably prompt remedial action upon learning of the kissing incident. When it happened, Ms. Wymore told co-worker Barb Johnson about it and she immediately went to get the supervisor, Mr. Shannahan. Mr. Shannahan returned and asked Ms. Wymore if the temporary worker had kissed her and then stated that he would take care of the matter. He immediately proceeded to the break room, found the temporary worker, and asked him if the incident had occurred. When the temporary worker admitted it, he told the temporary worker that this was unacceptable and told him he would have to leave the plant. Mr. Shannahan then called the temporary agency and asked them to come and get the worker and told the agency that this worker could never return the Empak. Ms. Schoeller and Mr. Garland also told the agency that this temporary worker could not return. Mr. Shannahan reported to the Complainant about what he had done and wrote a written report for submission to the Human Resources Department. The Human Resources Department investigated the incident and reported back to Ms. Wymore.

The Complainant argues that the response to the incident was not appropriate due to some comments made to her by Henny Schoeller when she reported the matter to the Human Resources Department. Ms. Schoeller was, in fact, reprimanded for telling the Complainant that her daughter had learned that smiling at a man in other countries may be taken as an invitation. Ms. Schoeller also apparently commented about Ms. Wymore using her elbow to push the worker away. While this conversation was not a model of how to handle a sexual harassment complaint, neither does it establish a failure to take timely and appropriate action. The written notes and reports surrounding the action of the Human Resources Department indicate that the

complaint was taken seriously and appropriate action taken. Empak ended the harassment which had occurred, even though its investigation was not without mistakes.

The Complainant also attempted to establish knowledge of the harassment on the part of the employer by arguing that there had been prior difficulty generally with temporary workers in the plant which should have alerted the employer to the existence of a problem. However, there is no substantial evidence in the record to show any prior sexual harassment by a temporary worker at Empak. It appears that on occasion temporary workers would use foul language in the plant and that on occasion temporary workers would show up smelling of alcohol. The evidence in the record indicates that temporary workers who showed up smelling of alcohol were returned to the temporary agency. However, the fact that some temporary workers had shown up with liquor on their breath or used foul language in the past does not mean that the employer had imputed knowledge of a sexual harassment problem among temporary workers. Generally, a complainant must establish that the employer knew or should have known of the harassment. However, even with prior knowledge, prompt remedial action may negate liability. *Fore vs. Health Dimensions*, 509 N.W.2d 557, 561 (Minn. Ct. App. 1993).

The Complainant also argued that not only the kissing incident, but all other incidents to which she testified should be considered in determining whether or not a hostile work environment existed at Empak. The examples testified to by the Complainant, however, were matters that were not reported to management or were not supported by competent evidence, or were such isolated incidents that they could not be construed to constitute a hostile environment. *Meritor Savings Bank FSB, supra*, 106 S. Ct. at 2405. An employer is, of course, not required to maintain a pristine work environment. *Continental Can Company, supra*, 297 N.W.2d at 249. The conduct which was proven by a preponderance of the evidence does not meet the threshold of pervasiveness to allow it to be actionable. It is relevant to the hostile work environment question that Empak did have sexual harassment policies in place and did conduct sexual harassment training for its employees and supervisors.

In order to establish a *prima facie* case for reprisal, a complainant must show a causal connection between the employee's statutorily protected conduct of the filing of a charge and an adverse employment action by the employer. *Hubbard, supra*, 330 N.W.2d at 444. The Complainant cites a number of actions which she believes were retaliatory, including a failure to follow through on a promised adjustment of sick leave, using her name among seven examples in a sexual harassment training seminar, refusing to give her requested days off in January and February of 1994, the fact that her fellow employees weren't as friendly to her, and a decision by Empak that she would not be eligible for rehire. Each of these matters were gone into in depth at the hearing. There is no probative evidence that anyone promised the Complainant any specific adjustment in her sick leave or vacation leave because of her prior status as a full-time employee. When a mistake was made in the accrual of sick leave for former part-time employees in January of 1994, the Complainant assumed that she alone was being given extra sick leave pursuant to her discussion with Human Resources during the summer of 1993. In fact, an error had been made for all employees moving from part-time to full-time status which was shortly corrected.

Ms. Wymore no doubt felt that the use of her name in an example at the sexual harassment training seminar was directed at her, however, it was merely one of seven examples which contained a number of names. The only reasonable conclusion is that the use of her name was a coincidence. The employer presented adequate business reasons for its refusal to give Ms.

Wymore time off in January and February of 1994. It is important to the company to have adequate full-time employees since the machinery runs 24 hours a day. Ms. Wymore's requests were denied because of prior time off and because of requests from other employees to take time off. The preponderance of the evidence does not indicate that this was done to retaliate against the Complainant. Ms. Wymore also felt that most of the employees and her supervisor were treating her differently and retaliating against her after she filed her charge in July of 1993. In fact, however, it appears that her co-workers and supervisor were unaware that she had filed a charge until after she left the company. The record indicates that the Human Resources Department kept the matter of the filing of the charge confidential. The employer indicated at the hearing that it had declared Ms. Wymore ineligible for rehire based upon a prior problem she had at Empak when she failed to follow lifting restrictions and failed to report an injury. Mr. Shannahan was also concerned about her attendance at work. While these matters do not seem substantial, neither was there evidence that the filing of the charge by the Complainant contributed to the decision not to rehire her.

The Complainant also alleged that John Garland, the plant manager, made three sexually suggestive comments to her over a period of three months at the end of 1993 and the beginning of 1994. The Complainant has not proved by a preponderance of the evidence that these comments occurred. Although she testified to them, Mr. Garland denied that they were made. None of the co-workers of the Complainant heard any of these remarks. Nor had they heard similar remarks from Mr. Garland on any other occasion. The record indicates Mr. Garland rarely appeared on the plant floor. The record also indicates that the noise level on the plant floor was such that conversation was difficult near any of the machines. There was no explanation of why Mr. Garland, after working several years as plant manager while Ms. Wymore was there, would suddenly begin talking to her in this manner. The evidence is insufficient to demonstrate that the statements were in fact made.

The Complainant also alleges that she was constructively discharged from her employment at Empak by the hostile work environment. A constructive discharge occurs when an employee resigns in order to escape intolerable work conditions caused by illegal discrimination. *Continental Can, supra*, 297 N.W.2d at 251. The intolerable working conditions must have been created by the employer "with the intention of forcing the employee to quit." *Johnson v. Bunny Bread Company*, 646 F.2d 1250, 1256 (8th Cir. 1981). Whether the conditions are in fact intolerable for the employee is judged by a reasonable person standard. The facts in this record do not support the Complainant's claim of intolerable working conditions. She told management and fellow employees that she was leaving employment in order to join her husband who was going to be working overseas. She had also indicated to co-workers that she was intending to return to school. She told no one that she was leaving because of sexual harassment or retaliation or an intolerable work situation. Although it would not be surprising that an employee would not give her employer the real reason for leaving if she was being discriminated against, in this case the events which Complainant points to as leading to her leaving the company do not support a conclusion of intolerable conditions. As indicated above, there was little factual support for the Complainant's perception that co-workers and employees were being less friendly. T. 635, 889. The kissing incident had occurred some ten months earlier. Ms. Wymore was allowed, as per her request, not to work with temporary workers after the incident. Although there is no doubt that the Complainant was upset about matters such as the company's failure to credit her for extra sick leave or vacation due to her prior full-time employment status and Mr. Shannahan's denial of her request for time off, the record does not

support a conclusion that these measures were retaliatory or intended to make Ms. Wymore leave the company.

The parties have requested that certain exhibits in this case be sealed. Under Minn. Stat. § 14.60, subd. 2, the Administrative Law Judge may seal all or part of the hearing record where not public information is present. Accordingly, those exhibits which contain personnel information either concerning the Complainant or other employees who were not a party to this case, are appropriately sealed in order to preserve the confidentiality of the personnel information. The Complainant's request that certain interview notes be sealed is denied because they do not constitute confidential information. Although the Complainant alleged that they are inaccurate, this reason is not sufficient to permit the exhibits to be sealed under the Administrative Procedure Act or the Data Practices Act.

Early in this proceeding, the Respondents made a motion *in limine* asking that evidence of other alleged acts of harassment not involving the Complainant be excluded from this record. At the hearing, the Administrative Law Judge denied the motion *in limine* as to witness Maurice Levy, but ruled that the testimony from witnesses Stonefield and Vann would be limited to the response of Empak in dealing with sexual harassment complaints made by these two witnesses. The motion *in limine* was granted insofar as the Complainant sought to explore the merits of the claims of the witnesses or the identity of the people who were complained about. T. 988-89. Subsequent to the hearing, Respondent Empak moved that certain portions of the transcript prior to the ruling be stricken to be consistent with the ruling of the Administrative Law Judge. Those portions of the transcripts cited were objected to by Respondent at the time and dealt with other examples of alleged harassment at Empak unrelated to the Complainant's claim. It is appropriate that they be stricken from the record. It is also appropriate that they remain in the transcript as an offer of proof, as is customary.

G.A.B.