

Not To Be Published:

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

DIANA RICKLEFS,
Plaintiff,

vs.

STEVEN ORMAN and CENTRAL
IOWA LUBRICATIONS, L.L.C., d/b/a
JIFFY LUBE,
Defendants.

No. C02-3061-MWB

**MEMORANDUM OPINION AND
ORDER REGARDING DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT**

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I. INTRODUCTION AND BACKGROUND

A. Procedural Background

On August 2, 2002, Diana Ricklefs filed a complaint in this court against her former employer, defendant Central Iowa Lubrications L.L.C., d/b/a Jiffy Lube (“Jiffy Lube”) and Steve Orman, the owner-operator of Jiffy Lube, alleging two causes of action: (1) a claim of sexual harassment in violation of the Civil Rights Act of 1964 (“Title VII”), 42 U.S.C. § 2000e. *et seq.*; and (2) a pendent state law claim under the Iowa Civil Rights Act (“ICRA”), IOWA CODE CH. 216. Specifically, Ricklefs asserts that defendant Orman created a sexually hostile work environment and that this led to her alleged constructive discharge.

On September 2, 2003, defendants filed a Motion for Summary Judgment on all of Ricklefs’s claims. First, in their motion, defendants claim that Ricklefs cannot establish a *prima facie* case of hostile work environment sexual harassment because the alleged conduct was not so severe or pervasive as to alter a term, condition, or privilege of employment and /or did not rise to an actionable level. Second, defendants claim that there is no evidence that Ricklefs was subjected to unwelcome sexual harassment, nor that she found any of the alleged conduct to be unwelcome or offensive. Third, defendants assert that Ricklefs cannot establish a *prima facie* case of constructive discharge because there is no evidence that the working conditions at Jiffy Lube were so intolerable that she was compelled to quit. Fourth, defendants contend that Ricklefs’s claim of constructive discharge fails because she left her employment without notifying her employer of any problems and without giving her employer a reasonable chance to work out any perceived problem. Fifth, defendants assert that Ricklefs’s claims against defendants are barred by the affirmative defenses established by the Supreme Court in *Burlington Indus., Inc. v.*

Ellerth, 524 U.S. 742, 765 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998) because Ricklef unreasonably failed to take advantage of corrective measures offered by Jiffy Lube. Finally, defendants claim that Ricklefs case should be dismissed because information acquired by Jiffy Lube after Ricklefs quit provides a valid reason for her discharge.

Subject matter jurisdiction over Ricklefs federal claim is proper pursuant to 28 U.S.C. § 1331 (federal question) and 42 U.S.C. § 2000e-5, which provides for original jurisdiction of claims under Title VII in the United States district courts. The court has jurisdiction over the state law claim alleging violations of the Iowa Civil Rights Act pursuant to 28 U.S.C. § 1367(a), which confers “supplemental jurisdiction over all claims that are so related to the claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.” 28 U.S.C. § 1367(a).

On October 16, 2003, Ricklefs resisted defendants’ Motion for Summary Judgment, arguing that there are genuine issues of material facts in dispute regarding all of her claims.

On December 15, 2003, the court heard telephonic oral arguments on defendants’ Motion for Summary Judgment. Plaintiff Ricklefs was represented by Blake Parker of Blake Parker Law Office, Fort Dodge Iowa. Defendants were represented by Darrell J. Isaacson of Laird, Heiny, McManigal, Winga, Duffy & Stambaugh, P.L.C., Mason City, Iowa. The oral arguments were of substantial assistance to the court in resolving the issues currently before the court. Before discussing the standards for defendants’ Motion for Summary Judgment, however, the court will first examine the factual background of this case.

B. Factual Background

The summary judgment record reveals that the following facts are undisputed. Diana

Ricklefs is a resident of Webster County, Iowa. Steve Orman is a resident of Mason City, Iowa. He owns and operates a Jiffy Lube franchise in Fort Dodge, Iowa, under the title of Central Iowa Lubrication, L.L.C. On July 2, 1999, Ricklefs began employment at Jiffy Lube as a lube tech. Prior to working at Jiffy Lube, Ricklefs had managed a strip bar, Scarlet O'Hara's, in Fort Dodge, and had worked for a company constructing elevators on a crew in which all the other members were male. Ricklefs was hired by Michael Dalton, Jiffy Lube's manager. Rollie Verness was Jiffy Lube's operations manager at that time. Ricklefs subsequently acted as the location manager at the Fort Dodge Jiffy Lube and assumed the duties of that position even though she was not directed to fill that position. Ricklefs reported to Verness.

The layout of the Fort Dodge Jiffy Lube store consists of a shop floor with two service bays and a central area. On the east side of the building, separate from the work area, is a customer area which contains a waiting room and restroom. Orman first became involved with Jiffy Lube on December 27, 1999, after Ricklefs had assumed the duties of a location manager. Orman supervised the daily operations at the Fort Dodge Jiffy Lube location and was physically present there nearly every day from December 27, 1999, until June 15, 2000. After June 15, 2000, Orman visited the Fort Dodge Jiffy Lube approximately one day per week. Verness was no longer involved with Jiffy Lube after March 2000.

At one point before Verness was no longer associated with the Fort Dodge Jiffy Lube, Ricklefs was standing on a step stool leaning over a Dodge pickup she was working on when Orman came up behind her and put both his hands on Ricklefs's buttocks. On several occasions Orman rubbed Ricklefs's back.¹

As of June 15, 2000, Ricklefs was promoted to location manager and Tim McMullen

¹Ricklefs stated in her deposition that she does not recall when Orman rubbed her back. Ricklefs Dep. at 256. Ricklefs was not sure how many times Orman rubbed her back but did recall that it happened on several occasions. Ricklefs Dep. at 256.

was promoted to first assistant manager. Orman was Ricklefs direct supervisor from December 27, 1999, until her employment with Jiffy Lube ended. One of Ricklefs duties as location manager was to review the provisions of the employee handbook with each new Jiffy Lube employee. The employee handbook contains Jiffy Lube's sexual harassment policy. Jiffy Lube's sexual harassment policy requires that: Any employee who feels that he or she is a victim of sexual harassment must bring the matter to the immediate attention of his or her supervisor or a designated person or persons in the local human resources department." Defendants' App. Ex. 9 at 4. Ricklefs was aware of the reporting requirements contained in Jiffy Lube's sexual harassment policy.

Orman was intense, demanding, and expected a lot from Ricklefs. Orman pushed Ricklefs hard, but Ricklefs expected him to be that way with her. Ricklefs's work performance was very "up and down", which resulted in several written reports from Orman in March 2001 through May 2001. In June of 2001, Orman told Ricklefs that if production didn't increase, she would not have a job in July. Following that conversation, Ricklefs worked harder and store performance improved.

At some point during Ricklefs's employment at Jiffy Lube, she let the teenage daughter of a former Jiffy Lube employee stay with her. One night following work, Ricklefs returned to her home to find the teenager naked with two naked males, one situated behind her and one in front of her. The following day at work, Ricklefs told Orman about the incident.

On September 4, 2001, Ricklefs had surgery on her right shoulder. On September 11, 2001, Ricklefs came to Jiffy Lube. Orman asked Ricklefs how she was doing, and she replied that her whole right side was sore. As Ricklefs said this, she rubbed her hip area and stated that it was bruised from having to lay on that area. In response, Orman asked Ricklefs if she had "checked her pussy." At the time Orman made the remark, Ricklefs was on medical leave. Ricklefs subsequently quit her job at Jiffy Lube. She decided to

quit on the day that she went to the unemployment office.² She never told anyone working for Orman that she was quitting. Orman and Tim McMullen expected Ricklefs to return to work following her medical leave. Orman first learned that Ricklefs considered herself unemployed when he received notice of a hearing on her application for unemployment. In September and October of 2001, Ricklefs never talked to Orman or Barry Krall, a co-owner, about the conditions for her possible return to work at Jiffy Lube.

Ricklefs alleges that Orman was the sole perpetrator of sexual harassment toward her. Ricklefs alleges that Orman committed the following acts of sexual harassment: that he grabbed her buttocks cheeks when she was on a foot stool working under the hood of a pickup truck; that he caressed her back; that he appeared before her on at least two occasions in a partial state of undress while he was standing in the restroom and she was outside³; that he stated that he liked long hair like hers during sex because he could take

²The record does not show when Ricklefs applied for unemployment compensation. Although defendants claim in their statement of facts that this occurred “sometime after October 1, 2001,” the portion of Ricklefs’s deposition they cite for that proposition does not support it. Rather, the following conversation occurred during Ricklefs’s deposition:

- Q. When did you decide not to return to your job?
A. The day that I went to the unemployment office.
Q. Do you remember that date? Or can you tell me that date?
A. No, I cannot.

Ricklefs Dep. at 268. Another document in defendants’ appendix, the Iowa Unemployment Insurance Decision, indicates that Ricklefs original claim date was October 21, 2001.

³Ricklefs contends that Orman would enter the restroom at the Jiffy Lube to change into or out of his uniform. After Orman had changed into his shirt but before he had put his pants on, he would open the door to the restroom, call Ricklefs over to the restroom door and then engage her in conversation while he was partially dressed. Ricklefs Dep. at 215-
(continued...)

women by the hair and guide their head and stated to her, “Di, I bet that’s how you like it”; once while both Orman and Ricklefs were washing their hands in the restroom, Orman locked the door and continued to talk about store policies; and, on September, 11, 2001, Orman asked Ricklefs whether she had “checked her pussy” following surgery. When she told him that she had not, he said, “I think you better go home and check.”

Ricklefs never told co-owner Barry Krall of any alleged sexual harassment. Ricklefs never told Orman that anything he said or did was considered offensive. However, at one point in July or August of 2001, Tim McMullen told Orman that he should not be taking off his pants in Ricklefs’s presence. When Orman responded by laughing and saying that his actions did not bother Ricklefs, Ricklefs retorted, “You want to bet?”

On October 1, 2001, Ricklefs filed a civil rights complaint with the Iowa Civil Rights Commission. The only incident of discrimination set out in the complaint was Orman’s statement on September 11, 2001.

During the time of her employment with Jiffy Lube, Ricklefs smoked marijuana. Ricklefs admits that she smoked marijuana twice at the job site, once with the then manager Mike Dalton. After Dalton left Fort Dodge Jiffy Lube, Ricklefs smoked marijuana on the job with Chris Johnson, the then manager of the Fort Dodge Jiffy Lube. Ricklefs told Orman about her general use of marijuana before he appointed her to be manager of the Fort Dodge Jiffy Lube. Ricklefs was arrested for possession of marijuana in October 2000 and ultimately pleaded guilty to that charge on March 21, 2001. Ricklefs told Orman about her arrest. On at least one or two occasions Orman was suspicious that Ricklefs was using marijuana but did not accuse her of it.

Following her employment at Jiffy Lube, Ricklefs told her psychiatrist, Dr. Okoli,

³(...continued)

227. On each of these occasions Orman would be wearing only his shirt and underwear.

that she had been smoking pot on a daily basis for the past year to calm her nerves. Ricklefs admitted at a probation revocation hearing held in June of 2002 that she smoked marijuana everyday, knew that she wouldn't quit, and did not want treatment.

Jiffy Lube's employee handbook contains the company's policy regarding the use of drugs and provides that:

Possessing, using, distributing or being under the influence of prohibited drugs or alcohol while on the job or on company property is cause for termination of employment. Prohibited drugs include, but are not limited to marijuana, hashish, heroine, cocaine, hallucinogens, depressants, stimulants, "designer" or generic drugs, or any other controlled substance not prescribed for current treatment by a licensed physician.

The use of prescribed drugs or over-the-counter drugs which may adversely affect performance or behavior must be reported by the individual to his or her supervisor upon reporting for duty. Abuse of over-the-counter or prescribed drugs is prohibited.

Defendants' App. Ex. 9 at 11. Ricklefs was aware that Jiffy Lube's drug policy prohibited the use of drugs on company property and that violation of this policy was grounds for termination of employment.

II. LEGAL ANALYSIS

A. Standards For Summary Judgment

This court has considered in some detail the standards applicable to motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure in a number of prior decisions. See, e.g., *Swanson v. Van Otterloo*, 993 F. Supp. 1224, 1230-31 (N.D. Iowa 1998); *Dirks v. J.C. Robinson Seed Co.*, 980 F. Supp. 1303, 1305-07 (N.D. Iowa 1997); *Laird v. Stilwill*, 969 F. Supp. 1167, 1172-74 (N.D. Iowa 1997); *Rural Water Sys. #1 v. City of Sioux Ctr.*, 967 F. Supp. 1483, 1499-1501 (N.D. Iowa 1997), *aff'd in pertinent*

part, 202 F.3d 1035 (8th Cir.), *cert. denied*, 531 U.S. 820 (2000); *Tralon Corp. v. Cedarapids, Inc.*, 966 F. Supp. 812, 817-18 (N.D. Iowa 1997), *aff'd*, 205 F.3d 1347 (8th Cir. 2000) (Table op.); *Security State Bank v. Firststar Bank Milwaukee, N.A.*, 965 F. Supp. 1237, 1239-40 (N.D. Iowa 1997); *Lockhart v. Cedar Rapids Community Sch. Dist.*, 963 F. Supp. 805 (N.D. Iowa 1997). The essentials of these standards for present purposes are as follows.

1. Requirements of Rule 56

Rule 56 itself provides, in pertinent part, as follows:

Rule 56. Summary Judgment

(b) For Defending Party. A party against whom a claim . . . is asserted . . . may, at any time, move for summary judgment in the party's favor as to all or any part thereof.

(c) Motions and Proceedings Thereon. . . . *The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.*

FED. R. CIV. P. 56(a)-(c) (emphasis added). Applying these standards, the trial judge's function at the summary judgment stage of the proceedings is not to weigh the evidence and determine the truth of the matter, but to determine whether there are genuine issues for trial. *Quick v. Donaldson Co.*, 90 F.3d 1372, 1376-77 (8th Cir. 1996); *Johnson v. Enron Corp.*, 906 F.2d 1234, 1237 (8th Cir. 1990). An issue of material fact is genuine if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394 (8th Cir. 1992) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)). As to whether a factual dispute is "material," the Supreme Court has explained, "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

248 (1986); *Rouse v. Benson*, 193 F.3d 936, 939 (8th Cir. 1999); *Beyerbach v. Sears*, 49 F.3d 1324, 1326 (8th Cir. 1995); *Hartnagel*, 953 F.2d at 394.

2. The parties' burdens

Procedurally, the moving party bears “the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record which show lack of a genuine issue.” *Hartnagel*, 953 F.2d at 395 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)); *see also* *Rose-Maston*, 133 F.3d at 1107; *Reed v. Woodruff County, Ark.*, 7 F.3d 808, 810 (8th Cir. 1993). “When a moving party has carried its burden under *Rule* 56(c), its opponent must do more than simply show there is some metaphysical doubt as to the material facts.” *Matsushita*, 475 U.S. at 586. Rather, the party opposing summary judgment is required under *Rule* 56(e) to go beyond the pleadings, and by affidavits, or by the “depositions, answers to interrogatories, and admissions on file,” designate “specific facts showing that there is a genuine issue for trial.” FED. R. CIV. P. 56(e); *Celotex*, 477 U.S. at 324; *Rabushka ex. rel. United States v. Crane Co.*, 122 F.3d 559, 562 (8th Cir. 1997), *cert. denied*, 523 U.S. 1040 (1998); *McLaughlin v. Esselte Pendaflex Corp.*, 50 F.3d 507, 511 (8th Cir. 1995); *Beyerbach*, 49 F.3d at 1325. If a party fails to make a sufficient showing of an essential element of a claim with respect to which that party has the burden of proof, then the opposing party is “entitled to judgment as a matter of law.” *Celotex Corp.*, 477 U.S. at 323; *In re Temporomandibular Joint (TMJ) Implants Prod. Liab. Litig.*, 113 F.3d 1484, 1492 (8th Cir. 1997). In reviewing the record, the court must view all the facts in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences that can be drawn from the facts. *See Matsushita Elec. Indus. Co.*, 475 U.S. at 587; *Quick*, 90 F.3d at 1377 (same).

3. Summary judgment in employment discrimination cases

Because this is an employment discrimination case, it is well to remember that the Eighth Circuit Court of Appeals has cautioned that “summary judgment should seldom be

used in employment-discrimination cases.” *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994) (citing *Johnson v. Minnesota Historical Soc’y*, 931 F.2d 1239, 1244 (8th Cir. 1991); *Hillebrand v. M-Tron Indus., Inc.*, 827 F.2d 363, 364 (8th Cir. 1987), *cert. denied*, 488 U.S. 1004 (1989)); *see also* *Snow v. Ridgeview Medical Ctr.*, 128 F.3d 1201, 1205 (8th Cir. 1997) (citing *Crawford*); *Helfter v. United Parcel Serv., Inc.*, 115 F.3d 613, 615 (8th Cir. 1997) (quoting *Crawford*); *Chock v. Northwest Airlines, Inc.*, 113 F.3d 861, 862 (8th Cir. 1997) (“We must also keep in mind, as our court has previously cautioned, that summary judgment should be used sparingly in employment discrimination cases,” citing *Crawford*); *Smith v. St. Louis Univ.*, 109 F.3d 1261, 1264 (8th Cir. 1997) (quoting *Crawford*); *Hardin v. Hussmann Corp.*, 45 F.3d 262 (8th Cir. 1995) (“summary judgments should only be used sparingly in employment discrimination cases,” citing *Haglof v. Northwest Rehabilitation, Inc.*, 910 F.2d 492, 495 (8th Cir. 1990); *Hillebrand*, 827 F.2d at 364). Summary judgment is appropriate in employment discrimination cases only in “those rare instances where there is no dispute of fact and where there exists only one conclusion.” *Johnson*, 931 F.2d at 1244; *see also* *Webb v. St. Louis Post-Dispatch*, 51 F.3d 147, 148 (8th Cir. 1995) (quoting *Johnson*, 931 F.2d at 1244); *Crawford*, 37 F.3d at 1341 (quoting *Johnson*, 931 F.2d at 1244). To put it another way, “[b]ecause discrimination cases often depend on inferences rather than on direct evidence, summary judgment should not be granted unless the evidence could not support any reasonable inference for the nonmovant.” *Crawford*, 37 F.3d at 1341 (holding that there was a genuine issue of material fact precluding summary judgment); *accord* *Snow*, 128 F.3d at 1205 (“Because discrimination cases often turn on inferences rather than on direct evidence, we are particularly deferential to the nonmovant,” citing *Crawford*); *Webb v. Garelick Mfg. Co.*, 94 F.3d 484, 486 (8th Cir. 1996) (citing *Crawford*, 37 F.3d at 1341); *Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995) (quoting *Crawford*, 37 F.3d at 1341); *Johnson*, 931 F.2d at 1244.

However, the Eighth Circuit Court of Appeals also observed that, “[a]lthough

summary judgment should be used sparingly in the context of employment discrimination cases, *Crawford v. Runyon*, 37 F.3d 1338, 1341 (8th Cir. 1994), the plaintiff's evidence must go beyond the establishment of a prima facie case to support a reasonable inference regarding the alleged illicit reason for the defendant's action." *Landon v. Northwest Airlines, Inc.*, 72 F.3d 620, 624 (8th Cir. 1995) (citing *Reich v. Hoy Shoe Co.*, 32 F.3d 361, 365 (8th Cir. 1994)); accord *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1134 (8th Cir.) (observing that the burden-shifting framework of *McDonnell Douglas* must be used to determine whether summary judgment is appropriate), *cert. denied*, 528 U.S. 818 (1999). In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the Supreme Court reiterated that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Reeves*, 530 U.S. at 142 (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).⁴ Thus, what the plaintiff's evidence must show, to avoid summary judgment or judgment as a matter of law, is "1, that the stated reasons were not the real reasons for [the plaintiff's] discharge; and 2, that age [or race, or sex, or other prohibited] discrimination was the real reason for [the plaintiff's] discharge." *Id.* at 153 (quoting the district court's jury instructions as properly stating the law). The Supreme Court clarified in *Reeves* that, to meet this burden, "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at 148 (emphasis added). The court will apply these standards to defendants' Motion for Summary

⁴In *Reeves*, the Supreme Court was considering a motion for judgment as a matter of law after a jury trial, but the Supreme Court also reiterated that "the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'" *Reeves*, 530 U.S. at 150 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986)). Therefore, the standards articulated in *Reeves* are applicable to the present motion for summary judgment.

Judgment.

B. Constructive Discharge

1. Requirements for constructive discharge

In their motion for summary judgment, defendants initially assert that Ricklefs's claim of constructive discharge fails as a matter of law.⁵ Thus, the court must first consider whether Ricklefs has generated a genuine issue of material fact that Orman's acts of sexual harassment led to her constructive discharge. To constitute a constructive discharge, a plaintiff must show more than just a Title VII violation by her employer. *Phillips v. Taco Bell Corp.*, 156 F.3d 884, 890 (8th Cir. 1998). A constructive discharge occurs when an employer deliberately renders the employee's working conditions so intolerable that the employee is forced to quit her job. *See Duncan v. General Motors*

⁵The court notes that in considering Ricklefs's discrimination claims it will not distinguish between her claims under Title VII and comparable sexual discrimination claims under the IRCA. This is appropriate because the Iowa Supreme Court has recognized that federal precedent is applicable to discrimination claims under the ICRA. *See Vivian v. Madison*, 601 N.W.2d 872, 873 (Iowa 1999) ("The ICRA was modeled after Title VII of the United States Civil Rights Act); *cf. Fuller v. Iowa Dep't of Human Servs.*, 576 N.W.2d 324, 329 (Iowa 1998) (recognizing that Chapter 216's prohibition on disability discrimination is the state-law "counterpart" to the ADA, and that, "[i]n considering a disability discrimination claim brought under Iowa Code chapter 216, we look to the ADA and cases interpreting its language."). Iowa courts, therefore, traditionally turn to federal law for guidance in evaluating the ICRA. *King v. Iowa Civil Rights Comm'n*, 334 N.W.2d 598, 601 (Iowa 1983). While federal law is not controlling and courts should not substitute the language of the federal statutes for the clear words of the ICRA, Iowa courts do look to the analytical framework utilized by the federal courts in assessing federal law. *Hulme v. Barrett*, 449 N.W.2d 629, 631 (Iowa 1989); *accord Board of Supervisors of Buchanan County v. Iowa Civil Rights Comm'n*, 584 N.W.2d 252, 256 (Iowa 1998) ("In deciding gender discrimination disputes, we adhere to the Title VII analytical framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 1824-25, 36 L.Ed.2d 668, 677-79 (1973.")).

Corp., 300 F.3d 928, 935 (8th Cir. 2002) (“An employee is constructively discharged if an employer renders the employee's working conditions so intolerable that the employee is forced to quit.”), *cert. denied*, 123 S. Ct. 1789 (2003); *Henderson v. Simmons Foods, Inc.*, 217 F.3d 612, 617 (8th Cir. 2000) (“A constructive discharge occurs when an employer, through action or inaction, renders an employee's working conditions so intolerable that the employee essentially is forced to terminate her employment.”); *Klein v. McGowan*, 198 F.3d 705, 709 (8th Cir. 1999) (“Constructive discharge occurs when an employer deliberately renders the employee's working conditions intolerable and thus forces him to quit his job.”); *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 574 (8th Cir. 1997) (“A constructive discharge occurs when an employer renders the employee's working conditions intolerable, forcing the employee to quit.”); *see also Johnson v. Runyon*, 137 F.3d 1081, 1083 (8th Cir.) (“A constructive discharge occurs when an employer renders the employee's working conditions intolerable, forcing the employee to quit.”) (internal quotations omitted), *cert. denied*, 525 U.S. 916 (1998); *Summit v. S-B Power Tool*, 121 F.3d 416, 421 (8th Cir. 1997), *cert. denied*, 523 U.S. 1004 (1998) (citing same). The intent element is satisfied by a demonstration that quitting was “a reasonably foreseeable consequence of the employer's discriminatory actions.” *Willis v. Henderson*, 262 F.3d 801, 810 (8th Cir. 2001) (quoting *Tidwell v. Meyer's Bakeries, Inc.*, 93 F.3d 490, 494-95 (8th Cir. 1996)). The employee has an obligation to act reasonably by not assuming the worst and not jumping to conclusions too quickly. *See Howard v. Burns Bros., Inc.*, 149 F.3d 835, 841-42 (8th Cir. 1998).

“[I]ntolerability of working conditions is judged by an objective standard, not the [employee's] subjective feelings.” *Gartman v. Gencorp, Inc.*, 120 F.3d 127, 130 (8th Cir. 1997) (quoting *Allen v. Bridgestone/Firestone, Inc.*, 81 F.3d 793, 796 (8th Cir. 1996)). First, the conditions created by the employer must be such that a reasonable person would find them intolerable. *See Gartman*, 120 F.3d at 130; *Tidwell*, 93 F.3d at 494; *Parrish v.*

Immanuel Medical Ctr., 92 F.3d 727, 732 (8th Cir. 1996); *Allen*, 81 F.3d at 796; *Bradford v. Norfolk S. Corp.*, 54 F.3d 1412, 1420 (8th Cir. 1995); *Smith v. World Ins. Co.*, 38 F.3d 1456, 1460 (8th Cir. 1994); *Hukkanen v. International Union of Operating Eng'rs, Hoisting & Portable Local No. 101*, 3 F.3d 281, 284 (8th Cir. 1993). Second, the employer's actions "must have been deliberate, that is, they 'must have been taken with the intention of forcing the employee to quit.'" *Delph v. Dr. Pepper Bottling Co. of Paragould, Inc.*, 130 F.3d 349, 354 (8th Cir. 1997) (quoting *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981)); *Jones v. Fitzgerald*, 285 F.3d 705, 717 (8th Cir. 2002); *Gartman*, 120 F.3d at 130; *Tidwell*, 93 F.3d at 494; *Parrish*, 92 F.3d at 732; *Allen*, 81 F.3d at 796; *Smith*, 38 F.3d at 1461; *Hukkanen*, 3 F.3d at 284. The Eighth Circuit Court of Appeals has explained that, "in the absence of conscious intent . . . , the intention element may nevertheless be proved with a showing that the employee's 'resignation was a reasonably foreseeable consequence' of the [discriminatory or retaliatory conduct]." *Delph*, 130 F.3d at 354 (quoting *Hukkanen*, 3 F.3d at 285); *Gartman*, 120 F.3d at 130 (also citing *Hukkanen*). Finally, "to act reasonably, an employee has an obligation not to assume the worst and not to jump to conclusions too quickly"; therefore, "[a]n employee who quits without giving his employer a reasonable chance to work out a problem has not been constructively discharged." *West v. Marion Merrell Dow, Inc.*, 54 F.3d 493, 498 (8th Cir.1995).

The Eighth Circuit Court of Appeals has affirmed constructive discharge verdicts, emphasizing the employee's lack of recourse within the employer's organization. For example, in *Delph*, the Eighth Circuit Court of Appeals upheld a constructive discharge verdict based on a hostile environment. *Delph*, 130 F.3d at 356-57. The court of appeals in *Delph* held that the hostile environment was bad enough to constitute constructive discharge, because the harassment--racial slurs--came from the plaintiff's supervisor and the offending language was not only used in the plaintiff's presence, but was directed at him. *Id.* at 356. In *Kimzey*, the Eighth Circuit Court of Appeals emphasized

management's indifference to the employee's complaints of hostile environment in affirming the plaintiff's verdict on constructive discharge: "If an employee quits because she reasonably believes there is no chance for fair treatment, there has been a constructive discharge." *Kimzey*, 107 F.3d at 574.

2. Evidence of constructive discharge

Defendants claim that Ricklefs cannot prove that she was subjected to intolerable working conditions and therefore her claim that she was constructively discharged must fail as a matter of law. Defendants further assert that Ricklefs's constructive discharge claim fails because she abruptly quit without giving her employer a chance to work out the alleged problem. Taking up the later assertion first, the Eighth Circuit Court of Appeals has explained that a plaintiff asserting a constructive discharge "is required to prove that the [employer] knew or should have known of the alleged harassment, because '[a]n employee who quits without giving his employer a reasonable chance to work out a problem has not been constructively discharged.'" *Willis v. Henderson*, 262 F.3d 801, 810 (8th Cir. 2001) (quoting *Tidwell v. Meyer's Bakeries, Inc.*, 93 F.3d 490, 494 (8th Cir.1996)). The court finds that there is at least a question of material fact as to whether or not defendants were afforded a reasonable opportunity to work out the problem because Ricklefs contends that on three occasions she telephoned then owner Rollie Verness regarding Orman's actions. Ricklefs alleges that she first contacted Verness after Orman grabbed her buttocks while she was working on a pickup. Verness told Ricklefs that "he would take care of it." Ricklefs Dep. at 98. Ricklefs alleges that after she complained to Verness, Orman confronted her and told her: "You are not ever to go over my fucking head. If you go over my fucking head again, you will be out that door." Ricklefs Dep. at 99. In spite of Orman's alleged threat, Ricklefs complained a second time to Verness about Orman's behavior. Specifically, that Orman was touching her buttocks and that he was being verbally abusive toward her. Ricklefs Dep. at 99. Again, Ricklefs alleges that Verness

told her that he would take care of it. Ricklefs Dep. at 99. However, after Ricklefs complained, Orman again instructed her not to go over his head with complaints to Verness. Ricklefs Dep. at 99-101. Ricklefs asserts that she complained on a third occasion about Orman to Verness. She alleges that she told Verness that Orman, in her presence, told other employees that he liked women to have long hair like Ricklefs because during sex he could take such women by the hair and guide their head. After telling this to the employees, Orman asked Ricklefs, "I bet you like it like that, Di, Don't?" Ricklefs Dep. at 106. Ricklefs asserts that her repeated complaints about Orman's conduct to Verness did not result in any change in Orman's conduct toward her. Although Ricklefs did not complain or object specifically to Orman regarding his comments on September 11th, the court nonetheless finds that there a question of material fact has been generated regarding whether defendants were afforded a reasonable opportunity to resolve work place problems because Ricklefs did make explicit complaints to defendants. Therefore, defendants are not entitled to summary judgment on their assertion that Ricklefs's constructive discharge claim fails because she abruptly quit without giving them a chance to work out the alleged problems in the workplace.

The court turns next to defendants' assertion that Ricklefs's constructive discharge claim fails as a matter of law because she cannot prove that she was subjected to intolerable working conditions. Although the court views this to be an extremely close question, viewing the facts in the light most favorable to plaintiff Ricklefs, the court finds that a material question of fact has been generated as to whether the totality of Orman's conduct rendered Ricklefs's work environment so difficult or unpleasant that a reasonable person in her position would be compelled to quit. The court notes that Ricklefs asserts that she complained to Verness on three separate occasions about Orman's workplace conduct but defendants did not take any meaningful corrective action. Instead, Orman castigated Ricklefs for her complaining about him. Orman allegedly did not refrain from repeating his

actions after Ricklefs' complaints about him. Ricklefs alleges that during the period of her employment with Jiffy Lube, Orman engaged in sexual touching of her buttocks, discussed business with her while he was in a partial state of undress, discussed his sexual preferences in her presence and then made follow up inquiries with regard to her sexual preferences, and finally, on September 11th, made remarks to Ricklefs which she viewed to be highly offensive and inappropriate. If proven to be true, a jury could reasonably conclude that Ricklefs felt humiliated and degraded by Orman's conduct toward her and that her workplace conditions were so intolerable as to cause a reasonable person to resign. Thus, the court finds defendants are not entitled to summary judgment on Ricklefs's claim that she was constructively discharged. See FED. R. CIV. P. 56(c) (summary judgment may only be granted where the record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."). Therefore, this aspect of defendants' motion for summary judgment is denied.

C. Sexually Hostile Work Environment

Defendants next seek summary judgment on plaintiff Ricklefs's claim that she was subjected to a sexually hostile work environment. Defendants argue that they are entitled to judgment as a matter of law on Ricklefs's hostile work environment claim because she cannot establish her *prima facie* case here because Orman's alleged actions, if proven to be true, were not so severe or pervasive as to alter a term, condition, or privilege of Ricklefs's employment.

The elements of Ricklefs's claim of a sexually hostile work environment are the following: (1) that she is a member of a protected group; (2) that she was subjected to unwelcome harassment; (3) that the harassment was based on sex; (4) that the harassment affected a term, condition, or privilege of employment; and (5) that the employer knew or should have known of the harassment, but failed to take prompt remedial action. See

Jacob-Mua v. Veneman, 289 F.3d 517, 522 (8th Cir. 2002); *Rheineck v. Hutchinson Technology, Inc.*, 261 F.3d 751, 755-56 (8th Cir. 2001); *Bogren v. Minnesota*, 236 F.3d 399, 407 (8th Cir. 2000) , *cert. denied*, 534 U.S. 816 (2001); *Stuart v. General Motors Corp.*, 217 F.3d 621, 631 (8th Cir. 2000); *Carter v. Chrysler Corp.*, 173 F.3d 693, 700 (8th Cir. 1999); *see also Beard v. Flying J. Inc.*, 266 F.3d 792, 797 (8th Cir. 2001) (mentioning only the first four elements); *Hocevar v. Purdue Frederick Co.*, 223 F.3d 721, 736 (8th Cir. 2000) (same).

As noted above, defendants contend that, Orman's treatment of Ricklefs was not sufficient, as a matter of law, to affect a term, condition, or privilege of employment, *see Beard*, 266 F.3d at 797, in that it was not sufficiently "severe or pervasive." As the Eighth Circuit Court of Appeals explained in *Beard*, with regard to this element of a sexual harassment claim, "Title VII makes actionable only conduct that is 'severe or pervasive enough to create an objectively hostile or abusive work environment--an environment that a reasonable person would find hostile or abusive.'" *Id.* at 798 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

Defendants direct the court's attention and rely on cases involving parades of horrors in which the Eighth Circuit Court of Appeals has nevertheless held that the alleged harassment was not sufficiently severe or pervasive as demonstrating that the conduct of Orman in this case does not rise to the level of actionable harassment. *See Duncan v. General Motors Corp.*, 300 F.3d 928, 931- 32 (8th Cir. 2002), *cert. denied*, 123 S. Ct. 1789 (2003); *Scusa v. Nestle U.S.A. Co., Inc.*, 181 F.3d 958, 966-67 (8th Cir. 1999); *Callanan v. Runyun*, 75 F.3d 1293, 1296 (8th Cir. 1996). In all three Eighth Circuit Court of Appeals's decisions relied upon by defendants, the court explained that pertinent factors to consider in determining whether conduct was sufficiently severe or pervasive include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or merely an offensive utterance; and whether it unreasonably interferes with

an employee's work performance. See *Duncan*, 300 F.3d at 934; *Scusa*, 181 F.3d at 967; *Callanan*, 75 F.3d at 1296. In all three of these cases, the court rejected the sufficiency of the plaintiff's allegations on the ground that the incidents cited were too few and far between.⁶ See *Duncan*, 300 F.3d at 935; *Scusa*, 181 F.3d at 967; *Callanan*, 75 F.3d at 1296.

Here, viewing the evidence in the light most favorable to Ricklefs, as the court must, the court finds that Ricklefs has presented sufficient evidence to generate a genuine issue of material fact on the question of whether she was subjected to severe and pervasive harassment. Viewed in the light most favorable to Ricklefs, this case is easily distinguishable from the facts of *Duncan*. First, Ricklefs alleges that she was subjected to physical groping by Orman on more than one occasion. The physical conduct involved here was not the mere brushing of a hand found in *Duncan* but Orman's placing his hands on her buttocks for an extensive period of time while she was in a vulnerable position. Moreover, her complaints regarding these incidents were not only ignored but led to her being verbally castigated by Orman for having the audacity to complain about his conduct. Ricklefs further

⁶In *Duncan*, a supervisor, James Booth, sporadically harassed the plaintiff, Diana Duncan, over a two-year period. *Duncan*, 300 F.3d at 931-33. Though Booth's behavior was clearly offensive and extremely disrespectful, the Eighth Circuit Court of Appeals held that it did not rise to the level of actionable harassment because the offending conduct was so isolated. *Id.* at 931-33. The majority characterized the sex-based harassment as follows: "a single request for a relationship, which was not repeated when [Duncan] rebuffed it, four or five isolated incidents of Booth briefly touching her hand, a request to draw a [sexually explicit] planter, and teasing in the form of a poster and beliefs for an imaginary [man hater's] club." *Id.* at 935. Similarly, in *Scusa*, the hostile work environment alleged there involved incidents of "teasing," "yelling," "fist shaking," "snotty and rude comments," and use of profanity. *Scusa*, 181 F.3d at 963 n. 2-3. The Eighth Circuit Court of Appeals affirmed the district court's finding that incidents considered "either individually or collectively," were not "severe or pervasive enough so as to alter a term, condition, or privilege of [] employment." *Id.* at 967.

alleges that she was forced to discuss business with Orman while he was getting dressed. In addition, Orman allegedly made sexually suggestive comments in her presence with regard to his sexual preferences and then made follow-up inquiries to Ricklefs concerning her sexual activities. Finally, Orman made vulgar and derogatory comments to her on September 11th which a jury could find to be objectively humiliating to a woman. The court notes that case law from this circuit suggests that the actions Ricklefs allegedly experienced are sufficiently offensive as to constitute sexual harassment. For example, in *Breeding v. Arthur J. Gallagher and Co.*, 164 F.3d 1151, 1159 (8th Cir. 1999). the Eighth Circuit Court of Appeals reversed the granting of summary judgment to an employer, concluding that a supervisor who "fondled his genitals in front of" a female employee and "used lewd and sexually inappropriate language" could create an environment severe enough to be actionable under Title VII. Similarly, in *Rorie v. United Parcel Service*, 151 F.3d 757, 762 (8th Cir. 1998). the court of appeals found that a work environment in which "a supervisor [] pats a female employee on the back, brushes up against her, and tells her she smells good" could be found by a jury to be a hostile work environment. Thus, the court concludes here that Ricklefs has designated "specific facts showing that there is a genuine issue for trial" on the issue of severity and pervasiveness, see FED. R. CIV. P. 56(e) (the non-movant's burden). While defendants assert that Ricklefs did not find many of Orman's actions objectionable, an assertion which Ricklefs disputes, the court cannot simply weigh the evidence and determine the truth of the matter, as defendants seem to ask the court to do, but must, instead, determine whether there are genuine issues for trial. *Quick*, 90 F.3d at 1376-77. Such genuine issues of material fact are present here on this element of Ricklefs's claim of sexual harassment. Therefore, this aspect of defendants' Motion for Summary Judgment is denied.

D. Ellerth/Faragher Defenses

Defendants also assert that they are entitled to summary judgment on the ground that there is no genuine issue of material fact that they are entitled to the *Ellerth/Faragher* affirmative defense to any sexually hostile work environment created by Orman.⁷ The Supreme Court, in *Burlington Industries, Inc. v. Ellerth* and *Faragher v. Boca Raton*, established an affirmative defense to employer liability for harassment by a supervisor:

When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. . . . No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998). "Thus, in the wake of *Ellerth* and *Faragher*, an employer is subject to vicarious liability for harassment by a supervisor, if that harassment resulted in a 'tangible employment action,' but the employer's liability for harassment by a supervisor is otherwise contingent upon an affirmative defense." *Joens v. John Morrell & Co.*, 243 F. Supp.2d 920, 932 (N.D. Iowa 2003).

Ricklefs asserts that because she suffered a tangible employment action, her

⁷One significant difference between sexual harassment claims under Title VII and the ICRA is that the Iowa Supreme Court has never adopted the *Ellerth/Faragher* model for vicarious liability of an employer for sexual harassment by a supervisor, so that the *Ellerth/Faragher* affirmative defense does not yet appear to be available to sexual harassment claims under the ICRA. See *Stricker v. Cessford Const. Co.*, 179 F. Supp.2d 987, 1014 (N.D. Iowa 2001).

constructive discharge, the *Ellerth/Faragher* affirmative defense is inapplicable here. Before an employer can assert the *Ellerth/Faragher* affirmative defense, the court must determine whether or not the plaintiff suffered a tangible employment action. See *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. If a tangible employment action was taken against the harassed employee, then the employer is foreclosed from asserting the *Ellerth/Faragher* affirmative defense and is subject to vicarious liability. See *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. A tangible employment action is generally defined as an action that "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits . . . in most cases [it] inflicts direct economic harm." *Joens*, 243 F. Supp.2d at 936 (citing *Ellerth*, 524 U.S. at 761, 762) (citations and quotations omitted).

Thus, the question the court must address here is whether a constructive discharge constitutes a "tangible employment action," as that term is used in *Ellerth* and *Faragher*. This court previously considered that exact issue in *Cherry v. Menard, Inc.*, 101 F. Supp.2d 1160 (N.D. Iowa 2000). In *Cherry*, this court found that "the court is not persuaded by [defendant's] argument, that a constructive discharge does not constitute a 'tangible employment action' as defined in *Ellerth/Faragher*." *Id.* at 1176. The Eighth Circuit Court of Appeals subsequently addressed the same issue and held that a constructive discharge, when proved, would constitute a tangible employment action. See *Jaros v. LodgeNet Entertainment Corp.*, 294 F.3d 960, 966 (8th Cir. 2002) ("The district court did not err in its instruction, since a constructive discharge constitutes a tangible employment action which prevents an employer from utilizing the affirmative defense.") (citations omitted); *Jackson v. Arkansas Dep't of Educ.*, 272 F.3d 1020, 1026 (8th Cir. 2001) ("If [plaintiff] was in fact constructively discharged, then the constructive discharge would constitute a tangible employment action and prevent the [defendant] from utilizing the affirmative defense."),

cert. denied, 536 U.S. 908 (2002); *accord Suders v. Easton*, 325 F.3d 432 (3d Cir. 2003) (concluding that a constructive discharge should be considered a tangible employment action for purposes of the *Ellerth/Faragher* analysis), *petition for cert. granted sub nom. Pennsylvania State Police v. Suders*, 72 U.S.L.W. 3105 (U.S. Dec. 1, 2003) (No. 03-95); *see also Robinson v. Sappington*, ___F.3d___, 2003 WL 22889501, *17 (7th Cir. Dec. 9, 2003) (holding that where official actions of a supervisor make employment intolerable, an employee’s constructive discharge may be considered a tangible employment action for the purposes of the *Ellerth/Faragher* affirmative defense). *But see Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999) (holding that a constructive discharge cannot be considered a tangible employment action for purposes of the *Ellerth/Faragher* analysis), *cert. denied sub nom. Metro-North Commuter R.R. Co. v. Norris*, 529 U.S. 1107 (2000). The court concludes that Ricklefs has generated genuine issues of material fact that she was constructively discharged and, hence, whether or not she suffered a “tangible detrimental employment action.” Thus, there are fact questions that must be resolved by a jury before the availability to defendants of the *Ellerth/Faragher* defense to Ricklefs’s sexual harassment claims can be determined. Therefore, this aspect of defendants’ Motion for Summary Judgment is denied.

E. After-Acquired Evidence

Finally, defendants contend that they are entitled to summary judgment on the ground that after-acquired evidence of Ricklefs’s drug use bars recovery for her unlawful discharge because defendants would have fired Ricklefs had they known of her drug use.⁸ In

⁸ The Iowa Supreme Court has adopted a variant of the after-acquired evidence doctrine for use in the context of employment discrimination. *See Walters v. United States Gypsum Co.*, 537 N.W.2d 708, 709-11 (Iowa 1995) (citing *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 360-61 (1995)).

McKennon v. Nashville Banner Pub. Co., 513 U.S. 352 (1995), the Supreme Court considered the impact of "after-acquired evidence" of an employee's wrong-doing upon the relief the employee may obtain for discrimination by the employer.⁹ See *Carr v. Woodbury County Juvenile Detention Ctr.*, 905 F. Supp. 619, 622-25 (N.D. Iowa 1995). In general, after-acquired evidence of misconduct during employment or in an application for employment is relevant in a discrimination case as follows:

In determining appropriate remedial action, the employee's wrongdoing becomes relevant not to punish the employee, or out of concern "for the relative moral worth of the parties," *Perma Mufflers v. International Parts Corp.*, [392 U.S. 134,] 139, 88 S.Ct. [1981,] 1984 [20 L.Ed.2d 982] [(1968)], but to take due account of the lawful prerogatives of the employer in the usual course of its business and the corresponding equities that it has arising from the employee's wrongdoing.

McKennon, 513 U.S. at 361; see *Carr*, 905 F. Supp. at 622-23. Thus, as to prospective equitable relief, "as a general rule in cases of this type, neither reinstatement nor front pay is an appropriate remedy," because "[i]t would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds." *Id.* at 362. The general rule for backpay, however, is less clear, see *Carr*, 905 F. Supp. at 623, although the Supreme Court offered the following guidance:

The beginning point in the trial court's formulation of a remedy should be calculation of backpay from the date of the unlawful discharge to the date the new information was

⁹ While the *McKennon* case involved an employee suing her former employer under the Age Discrimination in Employment Act (ADEA), the Supreme Court made clear that the principles it was articulating applied with equal force in discrimination cases based on Title VII as well as in cases based on the ADEA. *McKennon*, 513 U.S. at 357-58. Thus, they are applicable to Ricklefs's Title VII claims in this litigation.

discovered. In determining the appropriate relief, the court can consider taking into further account extraordinary equitable circumstances that affect the legitimate interests of either party. An absolute rule barring any recovery of backpay, however, would undermine the ADEA's objective of forcing employers to consider and examine their motivations, and of penalizing them for employment decisions that spring from age discrimination.

McKennon, 513 U.S. at 362.

Thus, the Court established in *McKennon* that where an employer seeks to rely upon after-acquired evidence of wrongdoing by the employee during his or her employment, the employer "must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge."¹⁰ *Id.* at 362-63; *Carr*, 905 F. Supp. at 624. Here, defendants assert that Ricklefs would have been fired if they had discovered that she had smoked marijuana while working at Jiffy Lube. Defendants, however, have not offered sufficient evidence suggesting that this is a matter of settled policy. Ricklefs concedes that she smoked marijuana twice on the Jiffy Lube premises, but on both occasions she smoked marijuana with the then locations manager and other Jiffy Lube employees. Moreover, she asserts that Orman was aware of her marijuana addiction at the time that she was hired by Orman to be the location manager, and that he still promoted her. In addition, she points to the fact that Orman concedes in his deposition that he suspected her of "smoking dope" but did not confront her about his suspicions. Orman Dep. at 87. Ricklefs also points out that

¹⁰ Defendants' reliance on the Eighth Circuit Court of Appeals's decision in *Welch v. Liberty Mach. Works, Inc.*, 23 F.3d 1403, 1406 (8th Cir. 1994), is misplaced. The Supreme Court's decision in *McKennon* overruled *Welch* with respect to its holding that the after-acquired evidence doctrine would bar any recovery under Title VII if the employer could show that it would not have hired the plaintiff-employee had it known of a subsequently discovered misrepresentation on the plaintiff's job application. *McKennon*, 513 U.S. at 356.

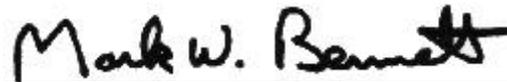
Orman was apprised of the fact that she was arrested on marijuana charges during the time that she was location manager but took no action against her. Ricklefs's submissions casts some doubt upon defendants' contention that they would have fired her if they had known about her drug use. In sum, the court concludes that Ricklefs is entitled to a jury determination of whether defendants would have in fact terminated Ricklefs if they had known about her drug use. Therefore, this portion of defendants' Motion for Summary Judgment is also denied.

III. CONCLUSION

For the reasons stated above, defendants' Motion for Summary Judgment is **denied**. The court concludes that Ricklefs has generated genuine issues of material fact on her claim of a sexually hostile work environment under Title VII and the ICRA.

IT IS SO ORDERED.

DATED this 19th day of December, 2003.



MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA