BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 150 and MADISON UNITED HOSPITAL LAUNDRY	Case 6 No. 43058 A-4540

Appearances:

Ms. Carol Beckerleg, Union Representative, SEIU Local 150, appearing on behalf of the Union.

Stroud, Willink, Thompson and Howard, Attorneys at Law, by Mr. James Cole and Ms. Lauri Morris, on the brief, appearing on behalf of the Employer.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and Employer or MUHL respectively, are signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing, which was not transcribed, was held on February 9, 1990, in Madison, Wisconsin. The parties filed briefs in the matter which were received by March 13, 1990. Based on the entire record, I issue the following Award.

ISSUE

The parties stipulated to the following issue:

> Was the grievant discharged for just cause? If not, what should the remedy be?

PERTINENT CONTRACT PROVISION

The parties' 1989-92 collective bargaining agreement contains the following pertinent provision:

ARTICLE XIII
DISCIPLINING FOR CAUSE

SECTION 1. Just Cause (for Misconduct)

Employees may be disciplined and/or discharged for just cause. Just cause shall include for example, such items as dishonesty, chronic absenteeism or tardiness; insubordination; possession or use of alcohol or other illegal substances on laundry premises; vandalism or sabotage; striking a fellow worker or supervisor; using threatening or abusive language or gestures toward fellow workers, supervisor or visitors; walking off the job without supervisory approval; misuse of time cards or punching another employee's timecard; pools or gambling in any form; solicitation including sale of any product or service; absences without prior consent of immediate supervisor or failure to DIRECTLY notify one's immediate supervisor or department manager or, in their absences, another member of management within twenty-four (24) hours of reason for an absence and the expected date of return. The items quoted above, by way of example, not by way of exception, shall constitute prima facie evidence of just cause, or reason, for disciplinary action up to and including possible discharge; other types of misconduct not mentioned above may also constitute just cause for disciplinary action. Any disagreement with discipline for just cause is an appropriate subject for the grievance procedure.

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PERTINENT WORK RULE

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18. Employee Harassment: Title VII of the Civil Rights Act of 1964 prohibits discrimination against anyone because of race, religion, color, ancestry, national origin, sex, or age. The above has been interpreted by the courts of law to also include sexual, racial, ethnic or religious harassment.

Harassment can include, but is not necessarily limited to:

A. Jokes of a sexual, ethnic, racial or religious nature

B. Hitting, grabbing, touching or caressing another employee regardless of the sex of the employee who

starts it

C. Implying or hinting by the use of gestures or conversation, the threat of any of the above. This may even include asking someone for a date while on the job.

Anyone engaging in such conduct incurs the risk of discipline for cause, up to and including termination. Anyone who feels that he/she may have been harassed by another employee or employees should report it to his/her supervisor. Department managers or supervisors will be responsible for enforcement, including investigation and taking whatever action may be necessary.

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FACTS

The Employer is engaged in the business of cleaning soiled hospital linens. The grievant, Gabriel Oviawe, was employed by the Employer for nine years before he was terminated August 14, 1989. 1/ At the time of his discharge, the grievant was working as a packer in the packing department.

Oviawe was discharged for sexually harassing Jean Anderson, a female coworker. The sexual harassment allegedly occurred on three separate occasions in March and April, 1989.

The first incident allegedly occurred in March as Anderson was leaving the workplace after her shift ended. Anderson testified that oviawe followed her up a stairway and ran his finger down her buttocks along the seam of her pants. Anderson testified that after it happened, she immediately whirled around, hit Oviawe with her lunch container and yelled "knock it off, mother fucker!", to which Oviawe responded by laughing and running up the stairs. Anderson testified she was upset and offended by the touching which she believed was not accidental but was instead an intentional and uninvited sexual gesture towards her. Oviawe denied touching Anderson on her buttocks, being hit by her with a lunch container or being sworn at by her.

The second incident allegedly occurred that same month as Anderson was again leaving the workplace after her shift ended. Anderson testified that Oviawe followed her up the stairway again and ran his finger down her buttocks along the seam of her pants. Anderson testified that after it happened she turned around, hit Oviawe with her lunch container and yelled "knock it off, you mother fucker!", to which Oviawe responded by laughing and running up the stairs. Anderson's co-worker, Cathy Davis, was walking up the stairs in front of Anderson at the time

1/ All dates hereinafter refer to 1989.

and heard a loud smack followed by Anderson saying "mother fucker". Davis asked Anderson what had happened and Anderson replied "that mother fucker grabbed my ass." Anderson rode home from work that day with Davis and during the trip Anderson told Davis that was the second time Oviawe had touched her sexually. Davis advised Anderson to tell management officials of the incident. Oviawe denied touching Anderson on her buttocks, being hit by her with a lunch container or being sworn at by her.

The third incident allegedly occurred early the next month (April). On that occasion, Anderson, Davis and Tom Campbell were standing together on the plant floor after the end of the work day. Each testified that Oviawe came up behind Anderson and grabbed or slapped her buttocks with what was characterized as a full hand grab and ran away laughing. Each interpreted this touching to be of a sexual nature. Immediately afterwards, Anderson yelled at Oviawe and ran after him for a ways before giving up the chase. Each testified Anderson was angry and upset upon returning to the others. Davis and Campbell urged Anderson to report the incident to management officials, but Anderson indicated she was scared of Oviawe and did not want any trouble with him. Oviawe denied touching or grabbing Anderson on the buttocks.

Neither Anderson, Davis nor Campbell reported any of these allegations to company officials at the time so management was unaware of them. Anderson's stated reasons for not reporting them were that she was afraid of Oviawe and his response if she reported him, she was afraid of rumors getting started regarding the matter and she believed she could handle it herself. Thereafter, Anderson purposely avoided Oviawe during and after work hours.

In August Anderson learned from acting lead worker (and brother) Scott Hatvelig that Oviawe would soon be moving to the soil sort department where she worked in order to be trained as the lead worker. Upon hearing this, Anderson informed Hatvelig that she was going to quit if she had to work with Oviawe. Hatvelig inquired as to the reason why whereupon Anderson recounted for him the above-noted incidents. Hatvelig then reported Anderson's allegations to his supervisor, Frank Wetzel.

After being advised of Anderson's allegations against Oviawe, management officials interviewed Anderson, Davis, Campbell and Oviawe. The accounts given by each to management do not vary substantially from that noted above. During the course of management's investigation, other female employes reported to management that Oviawe had made remarks to them which they interpreted to be sexually related or sexual innuendo. By his own admission, Oviawe's famous line to women co-workers was "give me some of your stuff". Management representatives determined this line contained sexual connotations because Oviawe told one female employe he "no longer wanted her stuff" because she was too old. After completing its investigation, management determined that although Oviawe denied touching Anderson on her buttocks on three occasions in March and April, he had in fact done so because Anderson's allegations were corroborated, in part, by Davis and Campbell.

The Employer adopted a policy prohibiting sexual harassment in 1981 which was communicated to all employes by posting and review at employe staff meetings. This policy was

later incorporated into the Employer's work rules which are also posted. Oviawe was aware of the Employer's policy and work rule prohibiting sexual harassment.

The Employer's personnel records indicate Oviawe was orally reprimanded about sexual harassment in 1985 and counseled about the Employer's sexual harassment policy by then Plant Manager Greg Wilhelm after a female employe complained about an incident involving Oviawe. The personnel records indicate Oviawe was orally reprimanded again about sexual harassment in 1988 and recounseled about the Employer's sexual harassment policy by Plant Manager Frank Wetzel when a female employe complained about a statement Oviawe allegedly made to her. Oviawe contends he never talked with Wetzel concerning the latter (1988) matter, while Wetzel contends that he did.

General Manager John Beachkofski made the decision to discharge Oviawe. In reaching this decision he testified he considered, and rejected, a lesser penalty than discharge because past warnings and counseling had not succeeded in changing Oviawe's conduct. Oviawe's discharge letter reads as follows:

> MUHL has a responsibility under the union contract and the governing laws to provide a workplace free from sexual harassment. All employees were informed and advised of MUHL work rules and the laws governing sexual harassment. You have previously been warned and reprimanded for engaging in sexual harassment.
>
> MUHL has just been informed that on at least three separate occasions you have engaged in sexual harassment of female employees in direct violation of MUHL work rules, the union contract, city ordinances and state and federal law. On those occasions the employee told you to "knock it off" and not do it again. Even after being told not to repeat the harassment you persisted.
>
> MUHL's union contract authorizes discharge for misconduct. Your harassment constitutes misconduct and you are discharged from employment at MUHL.

POSITIONS OF THE PARTIES

Union

It is the Union's position that the Employer did not have just cause to discharge the grievant. The Union argues that the Employer bears the burden of proving beyond a reasonable doubt that the grievant deserved to be dismissed from his employment. In the Union's view, the Employer has not met this burden because its case against the grievant rests heavily on rumor and innuendo by coworkers. The Union characterizes the grievant as an outsider, both by race (black)

and culture (Nigeria), whose speech and language patterns are not familiar to his co-workers. According to the Union, this explains his manner of unfamiliar joking with female co-workers. The Union submits that the unconscious fears and attitudes of these co-workers could have led to the instant misunderstanding and overreaction on the part of all involved. The Union further infers that the grievant's alleged actions toward Anderson could be interpreted as clumsy attempts to join her social circle, rather than sexual overtures. Next, the Union argues that the timing of the charges against the grievant cast doubts upon them because the alleged incidents were not reported to management at the time they supposedly occurred, but instead only months later. Moreover, the Union notes that the allegations were reported to management by Scott Hatvelig, who the Union characterizes as the person who would benefit most by the grievant's termination because he aspired to the lead worker position in the soil sort department which the grievant was going to fill. Finally, the Union contends that management did not follow the proper procedure here in imposing discipline because the grievant never received a formal warning about his conduct toward female co-workers prior to his discharge. Thus, in the Union's opinion, the penalty assessed here was excessive and discriminatory because lesser forms of discipline were still available. The Union therefore requests that the grievant be reinstated with a make-whole remedy.

Employer

It is the position of the Employer that it did not violate the parties' collective bargaining agreement by discharging the grievant. According to the Employer, the grievant was properly discharged for sexually assaulting a coworker three times after being told in no uncertain terms by the employe to stop it. Thus, in the Employer's view, his discharge was the result of his own conduct - conduct about which he had previously been warned - and for which he must be held accountable. The Employer asserts that it conducted a thorough investigation into the matter after learning of it which included speaking with the complaining employe as well as the witnesses to the incidents. That investigation convinced management that the complaint against the grievant was well founded and that the grievant's sexual conduct toward Anderson was unsolicited, intentional and not accidental. The Employer further asserts that its investigation disclosed that the grievant exhibited a pattern of sexually harassing conduct toward other female employes in the plant. The Employer contends that the grievant knew that sexual harassment was prohibited by both the Employer's work rules and the law because he had been previously warned against making sexual remarks to co-workers. The Employer submits that these previous warnings were not successful in changing or stopping the grievant's conduct though because he progressed from verbal sexual comments to sexual actions. As a result, management contends it had to take the strongest action possible to insure that its workplace was free from sexual harassment. In the Employer's view, if the grievant had not been fired after these repeated instances of progressively more serious sexual assaults, the confidence and security of other employes would undoubtedly be threatened. The Employer therefore contends that the grievance should be denied and the discharge upheld. In its opinion to hold otherwise would violate the other employe's rights and make a mockery of the Employer's work rule prohibiting sexual harassment.

DISCUSSION

The stipulated issue requires a determination whether the Employer had just cause to discharge the grievant. Two separate, although interrelated, considerations are involved in such a determination. The first is that the Employer demonstrate that the grievant committed acts in which the Employer has a disciplinary interest and the second is that the Employer show that the discipline imposed reasonably reflected its disciplinary interest in the grievant's conduct.

The Employer discharged the grievant for allegedly sexually harassing a female co-worker at work on three separate occasions. 2/ Sexual harassment is prohibited by federal, state and local laws, as well as the Employer's own work rules. In addition, the Employer is required to protect its employes from unwanted sexual harassment by maintaining a workplace free from sexual harassment. That being so, it is clear that the Employer has a legitimate and justifiable concern with as well as a direct interest in preventing employe sexual harassment. The issue here regarding the first element of the just cause determination turns, then, not on the Employer's interest in preventing sexual harassment by its employes, but instead on whether the grievant committed sexual harassment.

This call involves a head-on credibility dispute between Anderson and Oviawe, with Anderson contending, and Oviawe denying, that Oviawe touched or grabbed her buttocks on three separate occasions. Obviously, the charge turns on credibility.

After weighing the conflicting testimony, the undersigned concludes that Anderson's testimony that Oviawe touched or grabbed her buttocks on three separate occasions should be credited for the following reasons. First, there was no proof offered why Anderson would testify falsely against the grievant. In this respect, even the grievant admitted he had no particular problems with Anderson. Thus, there is no apparent reason for Anderson to lie or fabricate her account of the incidents. In contrast though, the grievant is trying to save his job. Anderson's credibility is further strengthened by the fact that she initially protected the grievant by not reporting the incidents to management. The fact that management officials had to ask her about the incidents, and that she only then disclosed it to them, shows that Anderson did not make her charges lightly because she understood it would be her word against Oviawe's. Second, Anderson's account of the second and third incidents were corroborated in large part by two witnesses (namely Davis and Campbell), while no witnesses corroborated the grievant's testimony. Davis' and Campbell's versions of those accounts are consistent for the most part with Anderson's. In addition they, like Anderson, had no apparent reason to lie or fabricate their accounts of what happened. The undersigned can find no conspiracy on the part of these witnesses

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2/ In its opening statement at the hearing, the Union contended that the Employer's decision to discharge the grievant was motivated, in part, by a desire to retaliate against him for filing a discrimination complaint with the Madison Equal Opportunities Commission. Other than the decision itself issued by the Madison Equal Opportunities Commission on that charge, no evidence concerning this contention was produced though. That being the case, this contention simply has not been substantiated.

against the grievant. 3/ In fact, they also protected the grievant by not initially reporting the incidents to management. Given the foregoing then, the undersigned believes Anderson's testimony that Oviawe touched or grabbed her on the buttocks on three occasions in March and April, 1989.

Having concluded that Oviawe engaged in the conduct complained of, the undersigned turns to the question of whether this conduct warranted discipline. Employer Work, Rule 18 expressly prohibits, among other things, "grabbing, touching or caressing another employee", and goes on to provide that violation of this rule will be grounds for disciplinary action. Inasmuch as that is exactly what happened here, it follows that oviawe's actions constitute misconduct warranting discipline.

In light of the conclusion that cause existed for disciplining the grievant for violating the above work rule, the question remains whether the punishment of discharge was proper. I believe that it was for the following reasons. First, the grievant's physical contact with Anderson was of a sexual nature, was offensive to her, was unwelcome and caused obvious discomfort to her. Moreover, it does not appear this contact was provoked or reciprocated. Instead, Anderson told Oviawe explicitly to stop it and keep his hands off her, but he failed to do so. Thus, this was not an accidental touching but instead was intended to intentionally gratify the grievant's personal desires. Nor was it, as characterized by the Union, simply a misunderstanding or overreaction. Second, this was not the grievant's first offense involving sexual harassment. Instead, the record indicates that Employer representatives had previously warned the grievant about sexual harassment and counseled him concerning the Employer's sexual harassment policy. The only question in this regard concerns the number of times this had happened. Even if, as alleged by the grievant, he was not warned and counseled in 1988 by Plant Manager Frank Wetzel about sexual harassment, there is no question he was warned and counseled in 1985 by then Plant Manager Greg Wilhelm. That being so, the grievant was aware that verbal and overt sexual conduct toward co-workers was prohibited and could subject him to severe discipline. Thus, he was on notice of the risk and consequence to his employment

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3/ In so finding, the undersigned has also considered Scott Hatlevig's involvement in the matter. The Union contends that Hatlevig, the person who reported the incidents to management in the first place stood to benefit the most from Oviawe's discharge because he, rather than Oviawe, could be the lead worker in the soil sort department. Even if such was the case, Hatlevig's testimony does not alter or affect the above-noted credibility findings because Hatlevig did not testify about any of the incidents. Instead, the extent of his involvement (as well as his testimony) in this matter was that he simply reported to management what his sister (jean Anderson) told him; management took it from there.

should he engage in such prohibited conduct. Next, the undersigned declines to accept the Union's implicit proposition that the grievant should be held to a different standard, or that his conduct herein be excused, because he is an "outsider" in terms of race and culture. By their very nature, work rules are designed to be applied uniformly to all employes. Thus, differences in race and culture have no bearing whatsoever in determining whether a work rule has, or has not, been violated. In this case, there is nothing in the record to indicate the Employer has been lax in enforcing its rule prohibiting sexual harassment in the past or applied that rule in less than an even-handed fashion. That being so, it does not appear that the grievant was subjected to any disparate or arbitrary treatment in terms of the punishment imposed. Finally, the Union notes that lesser disciplines than discharge (such as a suspension) were still available to management and could have been imposed. While certainly the normal progressive disciplinary sequence is for a discharge to be preceeded by a suspension, this is not to say that all discipline must follow this sequence. Some offenses are so serious they are grounds for summary discharge even if the employe has not received a prior suspension. In the opinion of the undersigned, the grievant's misconduct herein falls into that category. Accordingly, it is held that the severity of the discipline imposed here (i.e., discharge) was neither disproportionate to the offense nor an abuse of management discretion but was reasonably related to the seriousness of the grievant's proven misconduct.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That the grievant was discharged for just cause. Therefore, the grievance is denied.

Dated at Madison, Wisconsin this 14th day of May, 1990.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator

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