BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
BAY AREA MEDICAL CENTER EMPLOYEES UNION, LOCAL 3305, WCCME, AFSCME, AFL-CIO	Case 15 No. 50700 A-5196
and	
BAY AREA MEDICAL CENTER	

Appearances:

Mr. Laurence S. Rodenstein, Staff Representative, Wisconsin Council 40, appearing on behalf of the Union.

von Briesen & Purtell, S.C., Attorneys at Law, by Mr. Daniel T. Dennehy, appearing on behalf of the Employer.

ARBITRATION AWARD

Bay Area Medical Center Employees Union, Local 3305, WCCME, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Bay Area Medical Center, hereinafter referred to as the Employer, are parties to a collective bargaining agreement which provides for the binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the Employer, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over a discharge. The undersigned was so designated. Hearing was held in Menominee, Michigan, on June 16, 1994. The hearing was not transcribed and the parties filed post-hearing briefs which were exchanged on July 26, 1994.

BACKGROUND:

The facts underlying the grievance are essentially undisputed. The grievant was employed as a phlebotomist by the Employer commencing January 18, 1993. On January 20, 1994, Laurie Eggener, a housekeeper for the Employer, reported to Sandy Kangas, Human Resources Assistant, that the grievant made remarks to her that she considered sexual harassment. The grievant approached Eggener near Room 106 where she was working and said "Hi, gorgeous." Eggener stated to him that she did not take compliments well. The grievant also stated: "You could be the centerfold in Housekeeping magazine." Eggener reported that a week before this incident in the main hallway of the first floor he asked her: "What's that on your neck, a hickey? It better not be because when I divorce my wife, you better be there for me." On prior occasions the grievant had made comments to her, such as: "Why don't you date a real man some time?" and "Hi, gorgeous. You made my day."

On the afternoon of January 20, 1994, Eggener met with Gordon Wicklund, the Employer's Vice President of Human Resources, and reported these incidents to him. On January 21, 1994, Wicklund met with the grievant and informed him what Eggener had told him and that she considered these statements unwelcome, inappropriate and offensive. The grievant admitted making the statements with the exception that he could not remember the statement about the hickey on her neck. The grievant stated he did not believe the remarks were offensive and were simply normal flirtations, that he meant nothing by these comments and believed Eggener enjoyed the comments. Wicklund met again with Eggener on January 21, 1994, and asked her to explain the "hickey" remark again. She repeated it and Wicklund concluded that the grievant had indeed made the remark. Wicklund reviewed the grievant's past disciplinary record and met with the grievant's supervisor. Wicklund then sent the following letter to the grievant:

> On February 24, 1993, we discussed some inappropriate comments of a sexual nature you made to one of your fellow employees Bonnie Krueger. We asked you at that time to be thoughtful about how your comments to others might be perceived.
>
> On June 7, 1993, you received a written reprimand upon complaint by employee Lois Singer of inappropriate behavior of a sexual nature. It was stated at the time that a third incident of this nature would result in your dismissal.
>
> On January 20, 1994, employee Laurie Eggner (sic) brought a complaint about your behavior/remarks to her of a sexual nature. After our investigation we feel you have sexually harassed this person by making unwelcome sexual advances through verbal comments which created an intimidating and offensive working environment for employee Eggner (sic).
>
> This is the third instance of this conduct and you are hereby discharged in accordance with Human Resources Policy 438 "Sexual Harassment" and Article 5 of the Labor Agreement.

The grievant filed a grievance over his discharge which was processed to the instant arbitration.

ISSUE:

The Employer stated the issue as:

Whether Michael Madsen was properly discharged from the Bay Area Medical Center for engaging in sexual harassment in accordance with Section 5.01 (j) of the parties' agreement?

If not, what is the appropriate remedy?

The Union stated the issue as follows:

Did the Employer discharge Michael Madsen for just cause?

If not, what is the appropriate remedy?

The undersigned adopts the Union's statement of the issue in this matter.

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE 5 - DISCIPLINARY ACTION

Employees shall not be disciplined, except for just cause.

5.01 **Dismissal:** Employees may be discharged without warning or notice for the following offenses:

a.) Unauthorized and deliberate disclosure of any confidential information pertaining to the patients; personal, medical or financial records.

b.) Deliberate refusal or failure to perform work assigned by a supervisor, or to comply with supervisors' verbal or written instructions;

c.) Falsifying, or assisting in falsifying, personnel and/or other records, including medical records, employment applications, and time cards;

d.) Reporting to work or working while under the influence of alcohol or drugs;

e.) Unauthorized use of, or unauthorized possession of, drugs;

f.) Stealing or concealing in one's locker or on one's person any property belonging to the Center, employees, or patients;

g.) Malicious conduct, including damaging or destroying any property belonging to the Center, employees, or patients;

h.) Fighting on Center premises;

i.) Abuse of patients, employees, or visitors;

j.) Sexual harassment of patients, employees, or visitors;

k.) Unauthorized absence from work on any three (3) days within a 365-day period;

l.) Use of abusive or threatening language toward another person while on duty.

Discharged employees, with the exception of probationary employees, will receive written notice of the reasons for discharge. A copy of the notice will become part of the employee's personnel record. A copy also will be sent to the Union.

Discharged employees, with the exception of probationary employees, may appeal the action by presenting written notice to their steward and their department manager or head nurse within fourteen (14) calendar days after dismissal. Such appeals shall go directly to arbitration.

. . .

ARTICLE 22 - EMPLOYER'S RULES

The Center may adopt and shall publish rules which may be amended from time to time, provided, however, that such rules and regulations shall be submitted first to the Union for possible objections.

PERTINENT WORK RULE:

TITLE: SEXUAL HARASSMENT
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PURPOSE: To provide for a non-discriminatory working environment and establish guidelines for compliance with applicable state and/or Federal law.

POLICY: As a part of Bay Area Medical Center's continuing affirmative action efforts, and pursuant to the guidelines on sex discrimination issued by the Equal Employment Opportunity Commission, the Center holds that it is illegal and against the policy of Bay Area Medical Center for any employee, male or female,

to sexually harass another employee.

PROCEDURE: 1. Sexual harassment is defined as;

a) Making unwelcomed sexual advances, or requests for sexual favors, or other verbal or physical conduct of a sexual nature, a condition of an employee's continued employ- ment.

b) Making submission to or rejection of such conduct the basis for employment decisions affecting the employee.

c) Creating an intimidating, hostile or offensive working environment by such conduct.

. . .

4. Any supervisor, representative of other employee of the Center who has been found to have sexually harassed another employee will be subject to appropriate sanctions depending on the circumstances surrounding the offense. Discipline will range from a written warning up to discharge.

EMPLOYER'S POSITION:

The Employer contends that it acted properly when it terminated the grievant. It submits that it is obligated to prevent sexual harassment in the work place as sexual discrimination is illegal under state and federal laws and employers are subject to substantial penalties for violation of said laws. It asserts that the prevention of sexual harassment has been rigorously enforced by employers because of its public policy implications. It points out that it enacted its sexual harassment policy to provide a work place free of sexual harassment and the Union has not challenged the reasonableness of the policy.

It states that the grievant received instruction in the Employer's sexual harassment policy and his supervisor, David Drebert, gave him specific instruction on it on two occasions.

The Employer argues that the Union did not dispute the facts regarding the grievant's conduct as he did not testify with respect to the evidence. It claims that the grievant's conduct constituted sexual harassment. It maintains that he sexually harassed Bonnie Krueger when he told her at a time she was pregnant that he found pregnant women attractive, and on another occasion when he told her that he wanted to show Krueger's business card to his wife to make his wife jealous. Krueger changed her work habits to avoid the grievant and reported his comments to his supervisor, David Drebert. It insists that the grievant's comments were sexual in nature and created a hostile working environment. The Employer contends that the grievant sexually harassed Lois Singer when he touched her on the back of her neck and told her he thought women's necks were "sexy." It also points out that on another occasion he placed his head close to Singer's in a very personal manner. It notes Singer also complained about the grievant's conduct and found it inappropriate, offensive and unwelcome. It claims that his conduct constituted sexual harassment of Singer.

The Employer alleges that the grievant sexually harassed Laurie Eggener. It submits that the comments he made to her, on their face, constitute verbal conduct of a sexual nature and his denoting these "flirtations" indicate he intended them to carry a sexual connotation. Eggener complained that his comments were inappropriate, offensive and unwelcome and therefore, according to the Employer, constituted sexual harassment. It asserts that the Union's argument that the grievant's conduct did not constitute sexual harassment because he stopped his conduct to the specific complainant when the Employer instructed him to do so, misses the point because sexual harassment includes any and all verbal or physical conduct of a sexual nature which is offensive, intimidating or hostile.

The Employer asserts that the grievant's discharge was the appropriate penalty. It refers to its sexual harassment policy which provides for discharge without progressive discipline and to Section 5.01 of the agreement which provides for discharge without warning or notice for sexual harassment. It notes arbitrators have upheld discharge for sexual harassment absent prior progressive discipline as well as having upheld the discharge of employes who have received prior warnings about sexual harassment. It submits that the grievant was given a verbal warning as well as a written warning and was told any additional incidents would lead to termination. It submits that the grievant ignored these warnings and sexually harassed Eggener and therefore discharge was warranted.

The Employer argues that the grievance should be denied in all respects, but in the event the grievance is affirmed, it insists the grievant should not be reinstated with back pay.

UNION'S POSITION:

The Union contends that the grievant's conduct does not warrant discharge. It agrees that sexual harassment at the work place is serious misconduct but argues that the facts of this case show the grievant guilty of bad taste, or of unrequited flirting, or of puerile conduct but not sexual harassment. It submits that the grievant's speech contains nothing sexually suggestive except that he wanted Eggener to know he thought she was attractive. It alleges that a reasonable person might make the statements believing the other person would be flattered. It claims that the disputed remark about a "hickey" is far from sexually explicit. It points out that Eggener's testimony that the grievant said, "I want to do you," is contradicted by the omission of any such statement in the investigation or discharge.

The Union notes that speech considered sufficiently sexual to be labelled sexual harassment varies from work place to work place. It refers to Linda Dreyer's testimony that flirting, hugging, dirty joke telling are commonplace at the Employer's work place. It insists that in this climate, the grievant's awkward attempts at flirting are understandable and should not result in his termination. It maintains that his statements are without explicit sexual content or hint of abusiveness. It points out that he stopped his speech once he was told it was inappropriate, and Eggener never told him to stop speaking to her in this way.

The Union refers to the EEOC guidelines defining sexual harassment and the difficulty arbitrators have in defining sexual harassment. It submits they may not be able to define it but they know it when they see it. It suggests that one form of sexual harassment is where the listener hears objectionable statements. It takes the position that arbitral authority supports the Union's theory that the grievant's conduct, while obnoxious, is not sufficiently vulgar to be considered sexual harassment. It claims that the grievant's remarks did not interfere with the job performance of the other employes and are devoid of sexual content.

Citing King Soopers, Inc. 86 LA 254 (Sass, 1985), it states that conduct alleged to be sexual harassment is not automatically recognized as sexual harassment. It asserts that the employe must persist in harassing the other employe before the conduct becomes objectionable harassment. According to the Union, in King Soopers, several women alleged that they were physically and verbally sexually harassed but never gave the grievant negative feedback. In the instant case, the Union claims that the grievant's remark to a pregnant Krueger that "pregnant women look beautiful" is innocuous and the instance involving Singer, "women have sexy necks" and his placing his head near hers, the harassment content is nil. It suggests the grievant's comments to Eggener may be seen as sexist but are not in and of themselves sexual harassment and Eggener never told him she did not like his comments. It submits that Eggener's testimony is unreliable based on the addition of her "do her" testimony.

The Union asserts that the Employer fails to make a valid distinction between sexist comments and sexual harassment. It claims that work place norms differ and the Employer's work place is open to sexist comments as testified to by Dreyer and the grievant's conduct must be viewed through the prism of normal work behavior between the sexes at his work place. It alleges that Wicklund's view was not grounded in the day-to-day transactions among employes and suggests that his aberrant view is reflected by his incredible testimony. It claims that Wicklund had a bias against the grievant and fired him as punishment for a married man who might want to wander.

The Union posits that Wicklund overreacted by firing the grievant. It

states that progressive discipline was followed for the first two incidents, a verbal reprimand followed by a written reprimand. It maintains that the grievant's conduct was essentially the same in all three instances and there was no objective reason to depart from progressive discipline in the incident with Eggener. It claims that the Employer violated just cause by the discharge and the grievant was entitled to several additional steps of progressive discipline before being fired. It argues that the Employer violated the parties' agreement in that just cause was violated procedurally when the Employer failed to continue progressive discipline. It further contends that just cause was violated substantively when the sexist comments were considered to be sexual harassment.

It asks that the grievant be made whole, including but not limited to, back pay and interest.

DISCUSSION:

In general, an employer is obligated to promulgate policies with respect to sex discrimination. State and federal laws, as well as a clearly understood strong public policy, forbid sexual harassment in the work place and subject employers to substantial penalties for their violation. In the instant case, the Employer promulgated a work rule prohibiting sexual harassment in the work place. 1/ The procedures define sexual harassment to include "creating an intimidating, hostile or offensive working environment by such conduct. 2/ This policy is reasonable as it is substantially the same as the guidelines promulgated by the Equal Employment Opportunity Commission (EEOC). Sexual harassment does not require that the acts underlying the harassment be clearly sexual in nature. 3/ The grievant was made aware of the Employer's sexual harassment policy and did not deny that he was aware of it. 4/ Additionally, the grievant was given a verbal reprimand on February 24, 1993, 5/ and a written reprimand on June 7, 1993, 6/ and was warned that his conduct was considered to be sexual harassment and another incident would require dismissal. None of these matters are disputed by the Union.

The grievant did not testify so the testimony of Eggener as to the statements made to her by the grievant are undisputed. The Union argued that Eggener's testimony that the grievant said, "I want to do you," cannot be a basis for any action against the grievant. The undersigned agrees with the Union. The record indicates that Eggener did not report this statement to Wicklund on January 20 or 21, 1994, and the Employer did not base its discharge

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1/ Ex. 2.

2/ Id.

3/ Hall v. Gus Construction Company, 842 F.2d 1010, 46 FEP Cases 573 (8th Cir., 1988) where the Court stated: "Intimidation and hostility toward women because they are women can obviously result from conduct other than explicit sexual advances."

4/ Ex. 12, 16.

5/ Ex. 3.

6/ Ex. 4.

of the grievant on any reference to this comment, 7/ so this statement will not be considered as a basis for the discharge.

The main thrust of the Union's arguments is that the comments to Eggener are sexist but do not rise to the level of sexual harassment. The Employer contends the remarks constitute sexual harassment and that the three incidents, verbal reprimand, written reprimand and Eggener's complaint must be considered together rather than individually, otherwise a would-be harasser would get a free shot at each and every employe. The courts have held that evidence of sexual harassment directed at employes other than the complainant is relevant to show a hostile work environment. 8/ Therefore, all incidents may be considered to determine if the grievant created a hostile or offensive work environment.

Turning to the chief argument, the U.S. Supreme Court has held that harassment must be sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. 9/ Where the claimed incidents are few in number and occur over a short period of time, they do not rise to the level of a hostile or offensive environment. 10/

Determining sexual harassment is a matter of degree and is not mathematically precise but all the circumstances must be looked at including the frequency and severity of the conduct and whether it is physical or merely an offensive utterance. 11/ In short, a single, extremely severe incident from the perspective of a reasonable woman could create a hostile environment. On the other hand, numerous incidents, which if considered individually, would not be sufficiently severe to constitute sexual harassment, taken together can be sexual harassment. A victim's subjective response to alleged harassment is not an element of a hostile work environment but the standard in evaluating the conduct directed toward a female is that of a reasonable woman.

A review of the record in the instant case establishes that the grievant's conduct fell into the category that there were a number of instances which if taken alone would not constitute sexual harassment. There were three complaints by separate individuals within one year. The pattern taken together with the unwelcome comments about the "hickey" and the "centerfold" are not only sexist as argued by the Union, but are sufficiently offensive to a reasonable woman such that there is sufficient incidents severe enough to constitute sexual harassment under 1. c. of the Sexual Harassment Policy. Additionally, the grievant had been reprimanded verbally and in writing for his conduct before his comments to Eggener and thus his conduct is found to be sexual harassment.

7/ Ex. 14.

8/ Hicks v. Gates Rubber Co., 833 F.2d 1406, 45 FEP Cases 608 (10th Cir., 1987).

9/ Meritor Savings Bans, FSB v. Venson, 477 U.S. 57, 40 FEP Cases 1822 (1986).

10/ Lopez v. S. B. Thomas, Inc., 831 F.2d 1184, 45 FEP Case 140 (2nd Cir., 1987).

11/ Harris v. Forklift Systems, 126 L.Ed. 2d 295, 63 FEP Cases 225 (U.S. SupCt, 1993).

The grievant has argued that there was dirty joke telling, hugging and flirting which was common at the Employer's work place. Where sexual activity around a grievant is broad and general and occurs without objection, it does not excuse conduct made to selected individuals which is pointedly addressed to them. 12/ The work place mores do not excuse the grievant's conduct toward the individual women in this case.

Having concluded that the grievant's conduct constituted sexual harassment, the issue of penalty must be determined. Is discharge appropriate? Just as there is a weighing of all the factors to determine whether sexual harassment occurred, the penalty must fit the degree of improper conduct. In other words, just cause requires that the punishment fit the crime.

A review of the arbitration cases cited by the parties reveals the following:

In King Soopers, Inc., 86 LA 254 (Sass, 1985), the complainant alleged that the grievant grabbed her rear end and made comments which she believed were of a sexual nature. The grievant denied these allegations. The arbitrator found that the evidence failed to support the charges and upheld the grievance.

In American Protective Services, 102 LA 161 (Gentile, 1994), the grievant anonymously sent nine letters which contained expressions of affection with sexual content to a supervisor and when confronted, initially denied sending them, but later admitted it. The grievant admitted that she knew her conduct was wrong and had herself filed a complaint of sexual harassment against a different supervisor. The grievant was employed for only five months and under the circumstances, the arbitrator concluded discharge was appropriate. In KIAM, 97 LA 617 (Bard, 1991), the grievant sent flowers and gifts to an office employe and made calls to her and sent her letters and despite her explicit rejection of him, he continued his obsessive conduct. The arbitrator set aside the discharge and stated that the existence of sexual harassment does not automatically confer the right to discharge. In Container Corp. of America, 100 LA 568 (Byars, 1993), the grievant was hired in July and fired in October, 1991. The grievant was involved in different incidents including using inappropriate language to a woman employe, calling a black man, "boy" and putting his hand on a female employe's arm as she was exiting the women's restroom. The arbitrator sustained the discharge based on the grievant's short-time employment as well as his misconduct. In Flexsteel Industries, 94 LA 497 (Briggs, 1990), the grievant had been discharged two years earlier for similar conduct, had been warned that his foul language would not be tolerated four months before his discharge and made an obvious, lewd, sexually demeaning remark about a woman. The arbitrator noted that the grievant had been given a "second chance" and that discharge was appropriate.

In evaluating the instant case, the undersigned finds that the facts in King Soopers, Container Corp. and Flexsteel are easily distinguished from the instant case. The instant case has certain aspects in common with American Protective Services and KIAM, yet, the arbitrators upheld a discharge in one case and overturned it in the other. The undersigned is of the opinion that the discharge in American Protective Services was based, in part, on the

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12/ Steuben Rural Electric Corp., 98 LA 337 (LaManna, 1991); Flexsteel Industries, 94 LA 497 (Briggs, 1990).

grievant's short-term employment and the fact her misconduct began while she was still on probation. These elements were not emphasized in this case. Under the totality of the circumstances of this case, the undersigned finds that while the grievant was guilty of sexual harassment, that discharge was too severe for his misconduct. The appropriate penalty for the grievant's conduct is that he be reinstated but without back pay.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The Employer did not have just cause to discharge the grievant and it shall immediately reinstate him but without back pay.

Dated at Madison, Wisconsin, this 21st day of October, 1994.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator