Before the Arbitrator

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS LOCAL UNION NO. 579
Affiliated with the International Brotherhood of Teamsters

and

AVONMORE CHEESE, INC.
CHEESE DIVISION

Case 2
No. 55077
A-5573

Appearances:
For the Union: Previant Goldberg Uelmen Gratz Miller & Brueggeman S.C., Attorneys at Law, by **Ms. Heidi A. Eichmann**, 1555 N. RiverCenter Drive, Milwaukee, WI 53212.

For the Employer: Boardman Suhr Curry & Field, Attorneys at Law, by **Mr. Steven Zach**, Firstar Plaza, Suite 410, P.O. Box 927, Madison, WI 53701-0927.

ARBITRATION AWARD

Teamsters Local Union No. 579 (Union) and Avonmore Cheese, Inc. Cheese Division (Employer, Company or Avonmore) are signatories to a collective bargaining agreement providing for final and binding arbitration of grievances on which the Employer and the Union are unable to agree as to settlement. On April 9, 1997, the Wisconsin Employment Relations Commission received a request from the Union to appoint either a Commissioner or a member of its staff to issue a final and binding award in the above-entitled matter. The undersigned was appointed as arbitrator.An evidentiary hearing was conducted on June 23, 1997, in Monroe, Wisconsin. The proceedings were not transcribed. Each party waived the filing of a brief.

BACKGROUND:

The Employer operates a cheese-making facility in Monroe, Wisconsin. The grievant, D.W. has been employed by Avonmore for eight years. For the past three years he has also served as a union steward. He is and continues to be regarded as a good worker by the Company. However, as a result of an incident that occurred on the morning of March 21, 1997, following an investigation by the Company D.W. was suspended for one day without pay for sexual harassment and ordered to attend Employee Assistance Program (EAP) sensitivity training. The Union has grieved the Company's finding of sexual harassment as well as the one-day suspension.

E.L. is employed as a lab technician at Avonmore. Lab workers are not represented by the Union. She has been employed by this employer for three years, and achieved permanent position status in November, 1996. E.L.'s duties include ranging plant-wide for the purpose of obtaining samples from various sources in the cheese production area and testing them to ensure compliance with health regulations. Samples are obtained by swabbing the source with wet Q-tips and then transferring the sample to a petri dish. Samples are required to be taken from not only the finished cheese products, but liquid and solid ingredients used in the cheese-making process and production equipment and utensils. The hands of production employes, as well as protective gloves and footwear worn by them, are also swabbed weekly for samples and tested to ensure sanitary conditions are maintained. Samples are tested in a small lab in the warehouse.

At approximately 10:00 a.m. on March 21, 1997, E.L. approached D.W. in the production area in which he was working, and indicated she'd be back in five minutes for samples. When E.L. returned, D.W. removed a long, protective apron he had been wearing, and began to take off his protective gloves. E.L. explained that glove removal was unnecessary because she intended to swab only the gloves.

According to E.L., she was swabbing D.W.'s gloved hands as she attempted to tell him about the process. As she finished swabbing, E.L. reports D.W. saying to her, "I'd rather have you check my penis." E.L. says she responded to D.W.'s comment by stating, "I don't do that," and walking away.

D.W. acknowledges that he made a comment to E.L., but not quite the one she reports. According to D.W., "I said my hands are just as clean as my penis." E.L.'s response, D.W. said, consisted of a smile and the words "Oh, (name)." D.W.'s tone as he repeated the words he attributed to E.L. suggest that she uttered them in a reproving tone of disgust.

According to D.W., he made the comment he acknowledges before E.L. had completed taking the sample from his gloved hands, and that she completed her task before leaving. He further reports that there were two large fans on in the area which could have impeded normal hearing. D.W. says he had no difficulty in understanding E.L. even though he was wearing a hearing protector.

According to E.L., she had already taken her samples from D.W.'s gloves when his comment was made. E.L. further stated she had no difficulty in hearing D.W., and does not recall being conscious of any noise from the two fans in the area. E.L. recalled her surprise at D.W.'s remark, because she " . . .had had only two or three-word conversations with him before," e.g., "hi," "how are you?". She also reports being "speechless," and that she couldn't look D.W. in the eye. E.L has no idea why D.W. would make a comment of that nature to her. E.L. denies smiling after she heard D.W.'s remark.

D.W. further testified that after E.L had left his area, "I considered what I had said. . . it was stupid. . . I wasn't raised to say things like that . . .it just came out. . . I wished I could have taken it back." D.W. said he has since apologized to E.L. and believes she accepted his apology.

E.L. reports that as D.W. was the last employe from whom she needed to take samples, she returned immediately to the lab area where she reported the incident to a co-worker in the lab. The co-worker, Bobby Fisher, advised E.L. to tell senior lab technician Jane Coplien which E.L did. Coplien testified that E.L. reported D.W.'s comment to her as, "I'd rather have my penis done." Coplien described E.L. as " . . . shaking and almost in tears." Coplien reported the matter to the lab department supervisor Deidre Brannigan because she believed E.L. was very upset. Ultimately, E.L. repeated her story to Jim Crumbough, cheese division plant manager, in the presence of Brannigan. At this point the company launched an investigation.

In the course of the investigation E.L. also reported a short conversation with D.W. that had taken place the week before the one she reported. E.L. stated that in response to her greeting to D.W. of "how are you?," D.W. said, "horny." "That's not my problem," was E.L.'s rejoinder. D.W. claims to have no specific recollection of the encounter, but concedes he could have made the retort attributed to him. E.L. did not believe the exchange amounted to sexual harassment and had not reported it to anyone before the company began its investigation of the March 21 incident.

As a result of the employer's investigation of the incident, further facts emerged concerning yet another conversation of an allegedly salacious nature that had taken place in the week before March 21. Assistant cheesemaker and intake worker John S. Calow described this incident at hearing. By way of background, Calow acknowledged a three -

year friendship with D.W. He also knows E.L. and " . . . jokes around with her." According to Calow, he, D.W. and E.L were working in the same area on the date of the incident. After D.W. had left the immediate area, E.L. asked Calow if he'd heard the rumors that another female employe found D.W. attractive. Calow responded that the whole plant knew about that. Calow quoted E.L as then using crude language to express her wish that (name of female worker) would have sexual intercourse with D.W. and "get it over with." Calow testified that he did not perceive E.L.'s comment as directed at himself and that he relayed E.L.'s comments to D.W.

At hearing, E.L. conceded the incident occurred, but didn't remember using the exact words attributed to her by Calow. E.L. recalled her words as, "I just wish (name of female worker) would throw him down and get it over with so I wouldn't have to hear about this any more." E.L. had discussed this conversation with Human Relations Director Carol Kloepping in the course of the company's investigation of the incident on March 21. (E.L. was responding to the company's inquiry about "gossip" in the plant and had talked with Kloepping two or three times.) It does not appear E.L. ever spoke directly to D.W. concerning the subject-matter of her comment. Nonetheless, E.L., was verbally reprimanded by the Employer for her comment.

D.W. claimed to be a "little offended" by E.L.'s comment as relayed to him by Calow. He denied that his "penis remark" to E.L. on March 21 was intended as retaliation for her earlier observation to Calow. D.W. emphasized that sexual jokes were common in the plant, but continued to express regret for his remark to E.L.. D.W. agreed his comment was "inappropriate," and that he deserved some discipline for it. He continued to express disbelief that it rose to the seriousness of sexual harassment.

D.W. said both he and Calow were summoned to management offices by Company management at about 1:00 p.m. on March 21. D.W. anticipated the subject of the interview was going was going to be E.L.'s comment to Calow. Upon being seated in the designated office with Calow, he asked Calow to relate the story to the management representative present. When Calow finished he was excused; D.W. was then confronted with E.L.'s allegations concerning D.W.'s comment to her earlier that day.

At hearing, D.W. continued to maintain that his conduct did not rise to the level of sexual harassment. He suggested that Coplien helped stir up concern about the incident because of a certain animus towards him. D.W. explained that in his role as union steward he had had several confrontations with Coplien over the scope of activities lab technicians were permitted in the plant.

D.W. acknowledged that he has seen Avonmore's policy on sexual harassment. It is not clear, however, when he had seen it, and the copy of the policy entered into evidence appears to bear a date of 04/97. He continued to deny that his remark to E.L. was sexual in nature.

In argument, the Company justifies its discipline of D.W., noting sexual harassment is an offense which could lead to termination of employment. While acknowledging that D.W.'s offense was not so problematic as to require termination, the Company underscored the fact that the female to whom D.W. had directed his comment was clearly shocked by what he said.

The Company believes EAP sensitivity training is also appropriate for several reasons: 1) D.W. is a good worker whom the Company hopes to keep in its employ; 2) it appears that D.W.'s level of understanding the elements of sexual harassment needs to be raised; 3) the Company wants all of its employes to be able to function in a harassment-free work-environment; 4) in the current climate of sexual harassment litigation employes should understand that policies against sexual harassment not only protect the Company, but protect its investment in each individual employe; 5) D.W. and the Union agree that the EAP sensitivity training is appropriate.

The Union, on the other hand, argues that D.W.'s comment to E.L., while inappropriate, didn't reach a level of sexual harassment which should be immortalized in his employment record. The Union suggested that based on E.L.'s remark to D.W.'s friend and co-worker John Calow (who then relayed the remark to D.W.), D.W. had no reason to believe his subsequent comment to EL. a week later was "unwelcome."

The Union further argued that the Employer has previously allowed conversations with sexual innuendoes to take place in the plant, and that D.W. was unaware that conversational boundaries had been set in place.

While the Union was not contesting the requirement that D.W. attend EAP sensitivity training, it believes the one-day suspension and loss of pay is excessive. It further urges that if any discipline is imposed, it be for "inappropriate language" instead of "sexual harassment."

RELEVANT CONTRACT PROVISIONS

ARTICLE 9 - DISCHARGE AND SUSPENSION

Section 1. The Employer will not discharge, discipline or suspend any employee without just cause. Should the Employer initiate disciplinary action against any

employee, the Employer will give the employee at least one (1) written warning and the Employer shall issue notice of such disciplinary action within five (5) workdays, pursuant to the particular employee's work schedule, of having knowledge of the offense and will follow a progression of disciplinary action depending on the circumstances of the incident. In the event the disciplinary action taken by the Employer against the employee results in time off, such time off shall be scheduled within ten (10) work days, pursuant to the particular employee's work schedule. Written notification of the action taken shall be given to the employee with a copy to the shop steward and the Union. Disciplinary action against any employee shall not be considered precedent for disciplinary action against another employee whether for the same or different offenses. In order to achieve a reasonable progressive discipline system, the Employer shall have the right to discipline an employee by demotion of the employee for a three (3) month period. At the end of the three (3) month period, the employee will be returned to his former job. During the three (3) month period the Employer may temporarily fill the vacancy without regard to the job posting procedures.

Section 2. The Employer may immediately discharge an employee without resorting to progressive discipline for the following serious offenses, which shall not be considered inclusive:

1. Dishonesty and/or falsification of information or records.
2. Failure to report an accident.
3. Use, possession or being under the influence of alcohol or illegal drugs on the job or on the Employer's property at any time.
4. Carrying of unauthorized passengers while on the job.
5. Willful destruction of property.
6. Failure to report for work without notification for which there is no valid excuse.
7. Contamination of company products.
8. Acts endangering the life or well being of employees or others.
9. Possession, display or use of any type of firearm on the job or on the Employer's property at any time.

Section 3. All disciplinary actions, including warning notices, as herein provided shall be null and void and of no effect after a period of nine (9) months from the date of such disciplinary action or warning notice.

ARTICLE 25 - ANTI-DISCRIMINATION

Section 3. The Employer and Union agree that every employee is entitled to a working environment free of verbal, physical, visual or other harassment because of race, color, sex, age, national origin, sexual orientation, handicap, veteran status or any reason.

Harassment includes, but is not limited to, verbal or physical abuse, physical overtures or any kind of pressure to engage in sexual activity. Harassment of any nature is subject to discipline and discharge.

* * *

EMPLOYER'S POLICY PROVISIONS

AVONMORE CHEESE, INC.
POLICY ON HARASSMENT

POLICY ON HARASSMENT

The Company agrees that every employee is entitled to a working environment free of verbal, physical, visual or other harassment because of race, color, religion, sex, age, national origin, sexual orientation, handicap, veteran status or any reason. Harassment includes, but is not limited to, verbal or physical abuse, physical overtures, or any type of pressure to engage in sexual activity.

SEXUAL HARASSMENT

Sexual harassment is a complex issue but essentially it is an issue of RESPECT. It can be a divisive issue in the workplace, as some sides of (the) workforce may side with the victim, others with the alleged harasser. The issue can affect (an) individual's work performance, lead to low morale and tarnish the company's image.

WHAT IS SEXUAL HARASSMENT?

In general there are two type of harassment, the second being the most common:

1) Quid Pro Quo Harassment

From the (L)atin "this for that", this is when an employee is asked (by a higher ranking employee) to exchange sexual favors in return for employment advancement, benefits or job security.

1) Hostile Environment Harassment

This is sexually related activity, innuendo, objects or conduct that creates an abusive or hostile work environment for an employee. Harassment can be perpetrated by either sex or even the same sex as the harasser. Often the harasser may not be aware they

(sic) are doing something wrong. Harassment is not when the harasser thinks (s)he is harassing (the intent) but when the victim does (the effect). Harassment does not even have to be physical. It can be verbal or non-verbal.

WHEN IS HARASSMENT SEXUAL HARASSMENT?

Harassment is sexual harassment when one of the following three exists:

1) Conduct is sexual in nature
2) Conduct is unwelcome by the recipient
3) Hostile environment is severe, repeated or invasive enough to effect (sic) work

Hostile environment can be caused by jokes, comments, gestures, leering, pictures, repeated requests for dates or touching. As stated, the harasser may not be even aware they are doing something wrong. Harassment is in the eye of the beholder and behavior is perceived differently. If in doubt - don't say or do it.

WHAT TO DO IF YOU FEEL YOU ARE BEING HARASSED

Any employee who believes he or she has been subjected to harassment in the workplace is strongly encouraged to bring the problem immediately to the attention of their (sic) Supervisor. If the complaint is against a Supervisor, then the employee may go to another Supervisor or directly to the Director of Human Resources with the complaint. Employees can rest assured there will be no retaliation for filing a sexual harassment complaint in good faith nor will there be retaliation against anyone who cooperates in an investigation.

The Company will take appropriate corrective action, including disciplinary measures when justified to remedy all violations of this policy.

Avonmore values a good working relationship free from harassment for all our employees. Follow the Company policy on reporting instances - let your Supervisor know and have it stopped. It's both your right and your responsibility.

ISSUE

The Company offered its definition of the issue: did Avonmore have just cause to discipline Don Westby with respect to an incident which occurred on March 21, 1997.

The Union defined the issue as whether the incident which occurred on March 21, 1997 rose to the level of sexual harassment.

I define the issue as consisting of two parts:

1) Did the Employer have just cause to discipline D.W. with respect to an incident which occurred on March 21, 1997?

2) If so, was the discipline imposed reasonable under all of the circumstances?

DISCUSSION

The Employer disciplined the grievant, D.W., for sexual harassment as a result of an incident that occurred on March 21, 1997. The grievant, while in apparent agreement that his comment was inappropriate, denies that it rose (sank) to the level of sexual harassment.

The contract does not define sexual harassment specifically, but defines all contractually proscribed harassment (" . . . verbal, physical, visual or other harassment because of race, color, sex, age, national origin, sexual orientation, handicap, veteran status or any reason. . .") as including, but not limited to "verbal or physical abuse, physical overtures or any kind of pressure to engage in sexual activity." The contract adds that "(h)arassment of any nature is subject to discipline or discharge."

Presumably the Employer offered its unilateral "company policy" proclamation as an interpretation of the contractual definition. The first section of the policy simply reiterates the words of the contract. The remaining sections consist of a potpourri of language, portions of which appear to augment or add to contract language instead of merely interpreting it.

For instance, under the heading "When Is Harassment Sexual Harassment?, " the Employer asserts that only *one* of three conditions need exist for it to occur: 1) the conduct is sexual in nature; 2) the conduct is unwelcome by the recipient; 3) a hostile environment is (created) and is severe, repeated or invasive enough to affect work.

Thus, under the first condition *any* jokes of a sexual nature shared among friends constitute sexual harassment, whether or not the joke was mild, welcome, or the listener(s) were not offended; under the second circumstance *any* unwelcome criticism or comment to a co-worker (e.g., "your hair looks terrible," "the Bears play football poorly," "your car is really ugly,") also constitutes sexual harassment even though the comments or conduct are neither sexual in nature nor discriminatory; similarly, the third circumstance listed also lacks a nexus to conduct that is sexual or discriminatory in nature. Yet, under the law bad taste, poor manners, or coarse conduct, while clearly undesirable and sometimes offensive, does not necessarily constitute sexual harassment.

Viewed in this light, this portion of the Employer's policy seems unreasonably broad, at least as a guide to contract interpretation. Though undoubtedly intended to contribute to a more harmonious workplace, on its face it appears to go well beyond court-fashioned interpretations of "sexual harassment", and thus loses value as an interpretative guide to the parties' labor contract.

Sexual harassment is a form of unlawful discrimination.

> "Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."1/

> By its nature sexual harassment cannot be measured by " . . . a mathematically precise test. . . (W)hether an environment is "hostile" or abusive" can only be determined by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."2/

"The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.' . . . The correct inquiry is whether the complainant by her conduct indicated that the alleged sexual advances were unwelcome. . ."3/

In the instant matter, the uncontested facts indicate that D.W. made a comment to E.L. that included a totally gratuitous reference to D.W.'s penis. The week before, in response to a routine "how are you" greeting by E.L. to D.W., D.W. had told E.L. he was "horny." E.L.'s response was "that's not my problem."

Standing alone, neither utterance by D.W. necessarily constitutes sexual harassment, even though each (the second, in particular) could be deemed "offensive." But under the totality of circumstances, I believe D.W.'s allusion to his reproductive organ does constitute sexual harassment: not only was it offensive, but it could have been interpreted by a reasonable person as a thinly veiled sexual invitation.[1] Perhaps that accounts for the umbrage E.L. obviously took. Clearly the comment was unwelcome and created for E.L. a hostile or abusive work environment.

Notwithstanding the apparent propensity of plant workers for sexual joking, D.W. should have known this. By virtue of E.L.'s earlier reply to his telling her he was "horny," the woman plainly informed him that she had no interest in his sexual condition. Her reply was (or should have been) more than sufficient to alert D.W. that any further comments to her that described his sexual state were unwelcome. Apparently, he wasn't listening. Nonetheless, E.L.'s rebuff is the catalyst that serves to convert a coarse, mindless, and probably spontaneous jest into an invasive instance of sexual harassment.

The fact that E.L. contributed to plant gossip concerning the alleged "crush" another female employee had on D.W., between D.W.'s first and second comments to her doesn't alter the unwelcome status of D.W.'s second comment to her. E.L.'s comment *was* lewd and demonstrated poor judgment. It is also immaterial. For the fact remains it was not directed to D.W., but to a third employee. Under this circumstance it can be regarded as neither an invitation to D.W. to continue references to his sexual persona in her presence, nor a rescission of her rebuff to his initial sally.

Based on the foregoing, I find the Employer had just cause to discipline D.W. for sexual harassment for his comment to E.L. on March 21, 1997.

The question as to the reasonableness of the Employer's discipline remains.

Nothing in the record indicates that the sexual comment by D.W. was made with the intent to demean or embarrass E.L. Neither does the record compel the view that the comment was intended by D.W. as either a sexual invitation or intimidation. Certainly the comment does not appear to have physically threatened E.L., nor can it be characterized as representing a frequent occurrence. While these factors do not absolve D.W. of the sexual harassment with which he is charged, they significantly reduce the seriousness of the offense and work in mitigation of penalty.

I am also influenced by the apparently sincere contrition of D.W. that has included an almost immediate recognition that his words were inappropriate, a public acknowledgment of this at hearing, and a pre-hearing apology to E.L. which was apparently accepted by her.

I recognize that the Employer has already extended to D.W. what it believes to be the benefit of considerable discretion. As the Employer points out, sexual harassment can be a serious offense for which an employe can be fired. The conduct in this case did not reach those proportions; moreover, the Employer did not wish to fire an employe it continues to regard as valuable. At the same time, the Employer wanted to give a strong message to its work force that sexual harassment would not be tolerated

Balancing all of the circumstances of the case, however, I believe the l-day suspension imposed on D.W. is excessive and should be reduced to a written reprimand. This reduction, however, should not be regarded by any employee as diluting the Employer's obvious unwillingness to tolerate sexual harassment.

The Employer also ordered D.W. to attend EAP sensitivity training on sexual harassment. I sustain this directive. I regard it as corrective and educational, not punitive. The willingness of D.W. to attend this training is not particularly material, except as an indication that D.W. will likely be in a mindset to profit from it.

Finally, it deserves to be noted that by agreeing to a non-discrimination provision that proscribes the various forms of harassment listed therein, it is very apparent that the Employer and the Union are attempting to create a workplace that is more harmonious, humane, and productive as well as trying to reduce their own potential liability for unauthorized discriminatory actions. The parties are to be commended for their concern and their foresight.

AWARD

The grievance is in part sustained and in part denied. The Employer is directed to restore to D.W. the one-day's loss of pay incurred as a result of the suspension from work and to expunge said suspension from its personnel records. The grievant shall receive a written reprimand for his conduct on March 21, 1997, pursuant to the provisions of Article 9, sections 1 and 3 of the parties' labor agreement. The remaining condition imposed by the Employer on D.W. as to EAP sensitivity training on sexual harassment is sustained and hereby directed, but D.W. shall be on "in-pay" status while attending such training.

Dated at Madison, Wisconsin this 24th day of September, 1997.

/s/ A. Henry Hempe
A.Henry Hempe, Arbitrator

ENDNOTES

1/ Henson v. Dundee, 682 F.2d 897,902 (1982) cited with approval in Meriter Savings Bank, 477 U.S. 57, 67, 106 S.Ct. 2399, 91 L.Ed.2d 40 (1986).

2/ Harris v. Forklift Systems, 510 U.S. 17, 22-3, 114 S.Ct. 367, 126 L.Ed.2d 295 (1983).

3/ Mertier Savikngs Bank v. Vinson, 477 U.S. 57, 68 (supra, at note 1).

4/ Since this could be inferred from either reported version of D.W.'s utterance, it is unnecessary to sort out which version more accurately dipicts what was said.

5/ Since the E.L.'s comment is immaterial to a resolution of this matter it is unnecessary to determine which version of E.L.'s comment is accurate.

6/ The Employer and Union may also wish to consider a joint-educational approach to the entire workforce.

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