

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GENERAL TEAMSTERS UNION, LOCAL 662

and

ASSOCIATED MILK PRODUCERS, INC.

Case 1
No. 56436
A-5677

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, Attorneys at Law, by **Ms. Andrea F. Hoeschen**, appearing on behalf of the Union.

Felhaber, Larson, Fenlon & Vogt, Attorneys at Law, by **Mr. Edward J. Bohrer**, appearing on behalf of the Company.

ARBITRATION AWARD

General Teamsters Union, Local 662, herein the Union, and Associated Milk Producers, Inc., jointly requested the Wisconsin Employment Relations Commission to designate the undersigned as an arbitrator to hear and to decide a dispute between the parties. The undersigned was so designated. The parties waived the contractual Board of Arbitration and agreed that the undersigned would be the sole arbitrator in the matter. Hearing was held in Blair, Wisconsin, on March 18, 1998. No stenographic transcript was made of the hearing. The parties filed post-hearing briefs, which briefs were exchanged on April 30, 1998.

ISSUES

The parties stipulated to the following issues:

Was the grievant, MD, terminated for just cause? If not, what is the appropriate remedy?

BACKGROUND

The Company and the Union are parties to a collective bargaining contract covering certain production and lab employees at the Blair, Wisconsin plant. The grievant, MD, was a bargaining unit employee who had been employed by the Company for about 25 years at the time of his discharge. MD worked in the Intake Department and part of his duties required that he go into the Lab from time to time with milk samples. MD would spend some time in the Lab marking the samples, performing various clerical duties and placing the samples in the cooler in the Lab.

LT is an office employee and is not in the bargaining unit. She has worked for the Company for about 8 years. LT's duties require her to go into the Lab to pick up certain paperwork, referred to herein as manifests, each weekday morning, i.e., Monday through Friday, and also each Friday about mid-afternoon, i.e., around 3:00 p.m. The manifests, which relate to the bulk milk deliveries to the plant, are stored in a metal container attached to the wall near one of the entrances to the Lab. The manifests are loose pieces of paper which are not neatly arranged, but rather are merely dropped into the container. When she picks up the manifests, LT usually holds them against her chest with one or both arms so that the manifests are not blown onto the floor by the air flow as she opens the Lab door to leave. The Lab floor is usually wet, so the manifests could get wet and be difficult to read if they landed on the floor. After leaving the Lab, LT walks through the Intake Department and across an outside area to the scalehouse where she picks up additional documents. She then walks through the outside area into the main office building and goes up a flight of stairs to the second floor office area where she works. A shipping clerk also works in the same office area where LT works.

On Friday, November 7, 1997, LT entered the Lab shortly after 3:00 p.m. She greeted the employees who were in the Lab. Those employees were Jim Sendelbach, Doug Holte and Jim Hughes. While LT was removing the manifests from the container on the wall, MD entered the Lab. MD told LT that she could not take two of the manifests because he was still working on them. MD and LT had some discussion about whether they would see each other at a party on the next day. From that point on, LT and MD relate quite different versions of the succeeding events.

LT gives the following version of the incident. As she was standing with both of her arms holding the manifests against her chest, MD grabbed her shoulders with his hands, straddled her right leg with his legs and rubbed his genitalia up and down on her leg several times. LT pushed away from MD and looked at him briefly, then she turned and went out the Lab door. When LT looked back into the Lab through a window, she saw MD and Holte laughing, while Sendelbach put his hands up in the air and shook his head. She does not remember what Hughes was doing. LT proceeded to the scalehouse to get the paperwork there, then she returned the scalehouse key to the first floor office area and went back to the second floor office area to do her paperwork. She did not want to tell Jim Kleva, the Blair

Division Manager, about the incident until the other office people were gone. After sitting at her desk for about a half hour, LT went to Kleva's office to see how long he would be at the plant. However, when she went into his office, she decided to tell him right away about her encounter with MD, which she did. After hearing LT's account, Kleva got his coat and left the office area. LT returned to her desk, until about 4:25 p.m. when she got ready to go home. At that point Kleva returned to the office and asked LT if she was able to drive home. LT said she was able to drive home and then she punched out on her timecard and left to go home.

MD gives the following version of the incident. MD said that he reached up and got some manifests out of the wall container for LT, but that he did not touch her while he was getting the manifests. He and LT talked some about a birthday party. They both were joking and laughing. MD said he then put his left arm around LT's shoulders and pulled her right side against his left side to give her a hug. MD denied rubbing against her leg or any other part of her body. MD said LT did not give any verbal indication that she was bothered by the hug, but rather, they were talking and laughing as they walked out of the Lab together. MD said that LT then continued through the outer door of the building and he returned to the Lab.

Holte gave the following version of the incident. While LT was on her tiptoes trying to get the manifests from the wall holder, MD went over and put his left hand or arm on her left shoulder and with his right hand he took the manifests from the wall holder for her. Holte did not indicate that MD had lifted LT so she could reach the manifests. In a written statement submitted to the Company on November 11, Holte went on to say that MD placed his right hand on LT's left shoulder while they were talking, but the statement did not mention MD giving LT a hug. During his testimony at the hearing, Holte said that he thought MD put an arm around LT's shoulders and gave her a hug. In both his written statement and his testimony at the hearing, Holte said that LT was laughing and talking to MD as she left the Lab and did not appear to be upset.

Sendelbach did not testify at the hearing, but he did prepare a written statement on November 8 containing the following version of the incident. As LT was reaching up to get the manifests from the wall container, MD used both of his hands to pick her up by the waist, presumably to help her reach the manifests. Sendelbach stated that he was totally surprised, but his statement does not explain why he said he was surprised.

At the hearing a shipping clerk, Diane Herried, who works in the same second floor office area where LT works, testified that, when LT returned to the office in the late afternoon on November 7 after collecting the manifests from the Lab, she seemed normal. Herried said that she talked with LT and LT did not seem upset nor did she say anything about an unusual incident.

On Saturday, November 8, LT telephoned Ralph Bentz, another Company official, and related the incident to him. On Monday, November 10, at the Company's request, LT prepared a written account of the incident. Also on November 10, the Company suspended

MD without pay while it investigated the incident. On Tuesday, November 11, LT met with the Company's Human Resources Director, Gaile Bjerke. On the same date, Bjerke, Kleva and two Union representatives also met with MD, Holte, Sendelbach and Hughes. On November 19, 1997, the Company discharged MD for violating the Company's sexual harassment policy. MD's only prior discipline had been a warning regarding facial hair about 15 years ago.

The Company has a written policy on sexual harassment, which policy was given to all employees, including MD, in November of 1991. Said policy is also contained in a document entitled "Employee Guidebook." The Company policy on sexual harassment reads as follows:

EQUAL EMPLOYMENT OPPORTUNITY

"In American society today, there can be no place for actions or policies which serve to discriminate against certain groups on the basis of outdated concepts. Legally, morally, and economically, activities of this type are not and should not be acceptable. AMPI recognizes this and firmly supports the proposition of equal opportunity for all people."

from Corporate EEO statement

Your employer believes that the work place should be safe, productive, and as pleasant an environment as possible. Although Equal Employment Opportunity laws (or EEO) have periodically been revised to include specific groups or classes of protected people, the EEO statement covers a broad area.

Hiring, Recruitment, (sic) training and promotion, personnel actions, compensation, benefits, layoffs & recalls, social & assistance programs must all be administered without bias.

The 1992 Americans with Disabilities Act or ADA also mandates that reasonable accommodations (sic) must be made in the work place in order to further provide employment opportunities for the disabled. Employers are to focus on abilities, and accommodate (sic) or work around the disability if reasonable.

Sexual Harassment (sic) in the work place is illegal and will not be tolerated.

Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature including, but no (sic) limited to, the following:

1. Abusing the dignity of an employee through insulting or degrading sexual remarks or conduct;

2. Threats, demands or suggestions that an employee's work status is contingent upon the employee's (sic) toleration of or acquiescence to sexual advances;

3. Displaying in the work place, sexually suggestive objects or pictures;
or

4. The creation of a "hostile environment" which has the purpose or effect of substantially interfering with another individual's employment by creating an intimidating, hostile or offensive employment environment.

Complaints are to be directed to you (sic) immediately supervisor. If this is a problem, the next supervisor should be contacted or the manager or the coordinator.

Violations of this policy shall be investigated and are grounds for immediate discipline up to & including discharge.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 9. DISCHARGE

Section 1. The Cooperative shall not discharge any employee without just cause, but in respect to discharge shall give at least one (1) warning notice of the complaint against such employee to the employee, in writing, and a copy of the same to the Union, except that no warning notice need be given to an employee before discharge if the cause of such discharge is dishonesty, drunkenness or reporting for work under the influence of illegal drugs or alcohol, or for other grave offenses. An employee may be disciplined (including discharge) for violation of company rules so long as those rules are not in conflict with any of the terms and provisions of the contract. . . .

POSITION OF THE UNION

The Company lacked just cause to discharge MD and he should be reinstated with back pay. LT's account of the events on November 7 is unsupported by the evidence.

The Company did not call Holte, Sendelbach or Hughes as witnesses at the hearing to corroborate LT's allegations. Normally an employer risks a negative inference when it fails to call known witnesses to support its case. In this instance, a negative inference is unnecessary. The Union called Holte to testify and he corroborated MD's testimony and discredited LT's allegations. Holte specifically recalled that LT was laughing as she left the Lab on November 7. Further, Sendelbach's written statement did not support LT's allegations.

LT does not allege any sexual overtures from MD either on November 7 or on any previous occasions. Thus, with no advance notice, LT alleges that MD moved directly from an ordinary, platonic conversation to “humping” her leg and then releasing her without speaking. LT admitted that she did not make any protests during the alleged “humping” nor did she ask for help from the three other employees in the Lab.

LT’s actions were not consistent with her claims of emotional distress. Herried, who saw LT after the alleged incident, said LT seemed completely normal. LT did not take any time off from work until weeks after November 7. The Company offered to arrange professional help for LT. LT responded that she had not thought of getting professional help, but wondered if she needed an attorney. LT testified that she was ashamed to tell people about the incident, but she did call Ralph Bentz, the Assistant Division Manager, at his home within a day of the incident, although she had already reported the incident to Kleva, the Division Manager.

POSITION OF THE COMPANY

LT’s version of the incident is much more credible than is MD’s version. While MD does not agree with LT’s version of his actions, he and virtually all of the witnesses testified to some form of physical contact. Even assuming MD’s version to be correct, he was guilty of a physical assault which, at the work place, was harassment. The fact that LT didn’t either verbally accost MD or say no does not make the conduct acceptable or any less an act of assault/sexual harassment.

MD’s behavior was unwelcome physical conduct of a sexual nature which created an offensive, if not hostile, working environment, interfered with LT’s employment and abused her dignity. Thus, it was illegal sexual harassment which violated Company policies, and was a gross offense under the contract. The contract says that discharge is appropriate for a gross offense. Accordingly, the Company requests that the discharge be sustained.

DISCUSSION

As described earlier, LT and MD gave very different versions of the incident on November 7. Both versions did refer to some form of physical contact between LT and MD. LT asserted that MD deliberately straddled her right leg with his legs and rubbed his genitalia up and down her leg several times. LT said she pushed away from MD, looked at him for a few seconds, then turned and went out the Lab door. LT further stated that she did not say anything to MD, nor did he say anything to her, during the time he had physical contact with her and as she left the Lab.

MD admitted that he gave LT a quick hug, but said only their sides touched during the hug. MD denied straddling LT's leg and/or rubbing his genitalia on her. MD said he and LT were still talking and laughing when they went out the Lab door. MD also said that LT then left the building and he returned to the Lab.

There were three other employees in the Lab when the incident occurred. One of the employees, Hughes, told the Company that he did not see or hear any interactions between LT and MD because he had his back turned toward them. Both of the other two employees, Holte and Sendelbach, described different kinds of physical contact between LT and MD. However, neither of those descriptions supported LT's assertion that MD straddled LT's right leg with his legs and then rubbed his genitalia up and down her leg several times. Sendelbach's written account of the incident contained the following statements:

As (LT) was reaching up to get the manifest out of the contained, (MD) picked her up with both hands and lifted her up for a few seconds. I was totally surprised at what I saw. After LT gathered her manifest, they (MD and LT) walk out of Lab together.

Neither Sendelbach nor Hughes were called as witnesses at the hearing.

Holte described two instances of physical contact. The first contact occurred when MD put a hand on LT's shoulder while reaching to get the manifests out of the wall holder for her. They were talking at that time, but Holte said he could not hear what was being said. The second contact occurred when MD put his right hand on LT's left shoulder and gave her a quick hug. Holte also said that LT was laughing and talking when she left the Lab and she did not seem upset after the hug.

LT does not allege that MD made any suggestive or sexual comments to her during their conversation before he straddled her leg. Neither is there anything to indicate that MD had made any sexual overtures to LT prior to November 7.

LT said she did not say anything either to MD or to the other employees in the Lab either during, or after, the alleged incident. Such a reaction may well have been caused by surprise. The Company accurately contends that LT's failure either to say "no" to MD or to verbally request assistance from the other employees in the Lab does not make the alleged conduct acceptable if it occurred.

Kleva testified that, when LT came into his office on November 7, she was obviously upset, since she had difficulty in talking, her face was discolored, and she was shaking all over. However, Herried, the Shipping Clerk who worked in the same office area with LT, testified that when LT returned to the office in the late afternoon on November 7, she did not

appear to be upset, but rather, she seemed normal. They talked and LT did not mention any unusual incident. The Company asserts that such a difference in appearances can be explained by the fact that it would not be unusual for LT to try to maintain a normal composure in the presence of her fellow office employe while trying to decide if she should tell Kleva about the incident. The undersigned is not persuaded that such an assertion should be given much, if any, weight.

The Company's decision to suspend MD pending an investigation of the incident was reasonable in light of the seriousness of the allegation. The Company concluded that the investigation justified converting the suspension to a discharge. In doing so, the Company gave full credit to LT's version of the incident. Based on the testimony and the exhibits presented at the hearing, the undersigned cannot agree with the Company's decision to discharge MD.

Sendelbach said MD and LT walked out of the Lab together. While Holte was not sure if MD and LT went out of the Lab door together, he did say that LT was laughing and talking when she left the Lab. Thus, neither witness supports LT's testimony that she pushed away from MD and left the Lab alone without saying anything. I do not doubt that LT sincerely believes the physical contact between MD and herself was of an intentional sexual nature. However, I am persuaded that, when he hugged LT, MD did not intend his conduct to have any sexual connotations. Still, if his genitalia did make contact, even if it was unintentional, with LT's leg during the hug, then LT certainly could have interpreted the contact to have been intentional. Although a hug might be acceptable between good friends, in the instant case it apparently was either misinterpreted or was viewed as being more than a hug. MD did not have the right to initiate physical contact with LT. Such conduct made possible the inference of intentional contact of a sexual nature. Indeed, a hug may constitute a form of sexual harassment. However, in the instant matter, even if the hug was unwelcome, the act did not constitute a grave offense for which immediate discharge was appropriate. But the act was sufficiently serious so as to justify discipline. The undersigned concludes that MD should be reinstated to his job, but the reinstatement is to be without back pay.

Based on the foregoing, the undersigned enters the following

AWARD

That the Company did not have just cause to terminate MD's employment; that the Company did have just cause to discipline MD; and, that MD be reinstated immediately, but without any back pay.

Dated at Madison, Wisconsin, this 25th day of June, 1998.

Douglas V. Knudson /s/

Douglas V. Knudson, Arbitrator