BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL NO. 1086

and

ADVANCE CAST STONE COMPANY

Case 9
No. 59273
A-5883
(Termination of Jessica T**1)

Appearances:

McNally, Maloney & Peterson, S.C. by **Attorney Charles Magyera**, 2600 North Mayfair Road, Suite 1080, Milwaukee, WI 53226-1309, appearing on behalf of Advance Cast Stone Company.

Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., by **Attorney John J. Brennan**, P.O. Box 12993, Milwaukee, WI 53212, appearing on behalf of Laborers International Union of North America, Local No. 1086.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, Laborers International Union of North America, Local No. 1086 (hereinafter referred to as the Union) and Advance Cast Stone Company (hereinafter referred to as the Company) requested that the Wisconsin Employment Relations Commission designate the undersigned as arbitrator of a dispute over the termination of Jessica T**1. A hearing was held on December 20, 2000, at the Company's offices in Random Lake, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. The parties submitted the case on oral arguments at the end of the hearing, whereupon the record was closed.

Now, having considered the testimony, exhibits, other evidence, contract language, arguments of the parties and the record as a whole, the undersigned makes the following Award.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUES

The issues before the Arbitrator are:

1. Did the Employer have just cause to discharge the Grievant? If not,

2. What is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE 12
DISCHARGE OR SUSPENSION

Section 12.1. The Company shall not discharge an employee having seniority without just cause. The following shall constitute grounds for immediate discharge without notice: dishonesty, drunkenness, possession or use of controlled substances on Company property or while on duty, or recklessness while on duty, the carrying of unauthorized passengers, or any conduct of equal severity. Before an automatic discharge takes place, the Company and the Union will discuss the offense.

Section 12.2. Any employee may request an investigation as to the discharge or suspension. Should such investigation prove that an injustice has been done an employee, he/she shall be reinstated at his/her usual rate of pay while he/she has been out of work. Appeal from discharge or suspension must be taken within five (5) days by written notice, and shall be submitted under the grievance procedure or arbitration as provided in Article 7 of this Agreement. Any employee "quitting" his/her job or discharged for just cause shall forfeit all rights accumulated during employment, including right to vacation not yet taken with this firm. An employee quitting his/her job shall not lose his/her accumulated vacation right for the year preceding his/her most recent anniversary date of hire, provided that said employee gives one (1) calendar week's notice in writing prior to leaving employment with the Company.

. . .

(Appendix)

ADVANCE CAST STONE CO.
DISCIPLINARY POLICY

Disciplinary action for the offenses listed below or similar actions will take the following form:

FIRST OFFENSE: **Written Warning: A** formal notice documented in writing which becomes a permanent part of the employee's personnel file.

SECOND OFFENSE: **Suspension:** A period of time up to one (1) week when an employee is not permitted to work and is not paid.

THIRD OFFENSE: **Discharge:** Involuntary termination of employment. [This also applies if three (3) offenses for different infractions are accumulated in a six (6) month period.]

LIST OF ACTIONS WHICH WILL BE CAUSE FOR GRADUATED PENALTIES:

1. Repeated absenteeism.
2. Repeated tardiness (both reporting for work and being at work stations at starting times and after recesses).
3. Excessive absence from work stations for other than work purposes.
4. Unsatisfactory work performance.
5. Abuse of wash-up period.
6. Smoking in forbidden areas.
7. Loitering or loafing on the job.
8. Use of profane or indecent language to, or the abuse of, fellow employees.
9. Soliciting or collecting contributions for any purpose on Company property without specific Company approval.
10. Horseplay which may be endangering others.

THE FOLLOWING ACTIONS WILL RESULT IN AUTOMATIC DISCHARGE:

1. Dishonesty.
2. Drunkenness.

3. Possession or use of controlled substances on Company property or while on duty.
4. Recklessness.
5. Carrying of unauthorized passengers.
6. Conduct of equal severity to 1 through 5 above.

Before an automatic discharge takes place, the Company and the Union will discuss the offense.

. . .

BACKGROUND

The Company fabricates and installs architectural concrete and brick. The Union is the exclusive bargaining representative of the Company's non-exempt employees, including those workings as Patchers. The Grievant, Jessica T**1, worked for the Company for two and a half years in a variety of jobs, and was employed as a Patcher when she was discharged in September of 2000.

In December of 1998, the Grievant complained to Company President Matt Garni that another employee, Jeff R*****e, had touched her indecently and made inappropriate comments. Garni interviewed R*****e and the Grievant, and issued a warning to R*****e, cautioning that he would be immediately discharged in there was another occurrence of that type. He told the Grievant what he had told R*****e, and instructed her to report any further problems.

The relationship between the Grievant and R*****e continued to be bad, and in March of 1999, she made another complaint, this time about him calling her a "bitch." R*****e replied that she had called him a low life and had used profanity to him, and denied calling her a bitch. Garni interviewed the employees identified as witnesses, and could not confirm either story. He spoke with both employees about the use of offensive language and told them the Company would not tolerate it. Shortly after this, R*****e was discharged after an unrelated incident of misconduct. His conduct toward the Grievant was one factor in deciding that discharge was an appropriate penalty.

In September of 2000, Plant Manager Kelly H++++s saw a truck that was dirty. Someone had written a message in the dirt on the vehicle, and he told the Grievant to wash it. She was clearly unhappy with the assignment, but agreed to do it. After this, H++++s made a comment to employee John Holbach to the effect of "What's wrong with her? It must be a monthly thing." Holbach repeated the comment to the Grievant later, and she was offended. She complained to Matt Garni. On Thursday, September 21, he convened a meeting with H++++s to get his side of it, and H++++s agreed that he might have said

something along those lines. He apologized to her for his remarks. Garni commented that H++++s had five daughters and he was sure that he meant nothing sexually offensive by the comment. However, Garni told H++++s that he should not say such things to the Grievant, and had him sign a warning acknowledging that he had been told "do not talk about Jessica T**1 in any sexually harassing way."

The day before this, another employee, Jack Th##n, who was training the Patchers, stopped in the office and spoke to Office Manager Mary Garni, who is Matt Garni's sister. He told her that the Grievant had commented to him earlier in the day that her period had ended four days earlier, and that she was "bleeding like a fucking pig." Th##n found the comment offensive because he was not used to hearing ladies speak that way. The comment was reported to Matt Garni, but he was on his way out of town, so he did not speak with Th##n until Thursday.

On Thursday, right after the meeting over the Grievant's complaint about H++++s, Foreman Roger A####a stopped to speak to Matt Garni. He told him that the day before, he had told the Grievant to take an air hose and blow some dye off of a panel. She asked him if he would like her to blow it hard or soft, which he took to be a sexual innuendo. This was said in front of other crew members, some of whom laughed, and he told Garni that he was embarrassed by it. One reason A####a reported it to Garni was that he knew the Grievant had been complaining about others making sexually harassing comments, and he didn't feel he should have to endure the same type of thing from her.

Shortly after A####a came to the office, Maintenance Supervisor Jim Mueller stopped. He complained to Garni that he had been walking past the Grievant and another employee when the Grievant said loudly "I'm a bitch – Jim will verify that." Mueller had replied "Yeah, I'll verify that." This exchange irritated Mueller, because he knew that if he had called her a bitch she would have complained about him, and he felt there was a double standard, particularly in light of the warning given to H++++s.

Garni was out of the office on Friday, but he thought about the complaints against the Grievant and by Saturday morning he had decided she had to be fired. He told Plant Superintendent Roger Meyer to meet her at the door when she reported for work and tell her she was being discharged. Meyer instead met with H++++s to discuss the matter, and told Garni that they should first speak with someone from the Union. Garni agreed, and he met with Steward Regan Schmitt. He described the allegations against the Grievant and told him they were going to terminate her, because the various supervisors could not be expected to tolerate the comments and language she had used.

Garni met with the Grievant and told her she was being terminated. She took a copy of the termination notice, which listed prior offenses in December of 1998 and March of 1999 "relative to Jeff R*****e." The Disciplinary Notice form contains two categories of offenses, those that are subject to progressive discipline and those that are cause for automatic discharge.

On this form, after the six listed causes for automatic discharge, was written in "7. 12-98 previously warned, by MG ACS would not tolerate offensive behavior. 3 separate instances brought to my attention in the last 24 to 48 hours. See back." The back of the copy she took with her did not have anything written on it.

She immediately called Union Business Agent Miles Mertens and told him what had happened. He told her he would look into it, and on Monday Mertens received faxes from the Company containing the notice of discharge, and the back of the form. On the back of the original was written:

> Jessica refused to sign.
> 1. Jessica to co-worker at wash basin w/Jim Mueller. Jessica to co-worker "I'm a bitch" "Just ask Jim, he'll tell you I'm a bitch."
> 2. Jessica to Jack Th##n talking about her period and "bleeding all the time."
> 3. Jessica to Roger A####a (foreman) in front of co-workers after Roger had asked her to blow off the color from a panel Jessica had asked him if he would like "it blown slowly or fast" (sexually).

The instant grievance was thereafter filed protesting the discharge. It was not resolved between the parties and was referred to arbitration. At the arbitration hearing, in addition to the facts recited above, the following testimony was taken:

Matt Garni testified that he had previously warned the Grievant that offensive behavior would not be tolerated in March of 1999 after the second incident with R*****e, and that he considered this to be discipline for sexual harassment. He acknowledged that disciplinary notices are removed from files after six months, and that the Grievant's personnel file did not contain any discipline for offensive language or profanity at the time she was discharged. He expressed the opinion that sexual harassment was subject to a stricter standard, and that the Company treated sexual harassment as on a par with the serious offenses calling for automatic discharge. The Company's policy called for one warning, and then termination for any second offense, whether or not six months had passed from the first offense. He acknowledged that the policy had not yet been reduced to writing, but said that employees were made aware of the policy when they were given their initial warning, i.e. they were told that another offense would lead to automatic termination. According to Garni, the reason that R*****e was not automatically terminated for the second run-in with the Grievant was that he felt both of them were at fault.

Garni agreed that he usually contacted Mertens before terminating an employee if he felt it was a close call, but that he thought this was a clear-cut case. While automatic discharges require advance notice to the Union, he felt that informing the steward was sufficient. In fact, when he told the Steward he was firing the Grievant, the Steward said "fine, that's good." He was not sure if there had been other cases where employees were

summarily discharged without advising Mertens or the other full-time business agent. Garni acknowledged that the general use of rough language around the plant was not unusual, but said that it was not common to have profanity directed to another employee.

Jessica T**1 testified that she had no recollection of ever receiving a warning or discipline of any type from Garni over the second incident with R*****e, and was never told that she would be fired if she was responsible for an incident of sexual harassment. While she had had some discipline over her two and a half years of employment, she had never been disciplined for offensive language and never heard of anyone being disciplined for offensive language. She admitted that she used profanity from time to time, and said that other employees did as well.

According to T**1, when she met with Garni on Saturday, September 23rd, he told her she was being terminated for offensive behavior, but refused to explain what behavior. When she pressed him, he mentioned something about Jim Mueller, and the word "bitch." She asked for a copy of the discipline notice, and he told her the meeting was over. She grabbed a copy of the notice from the table and they walked her out of the plant. She did not know about the alleged complaints by Th##n and A####a until Mertens got the rest of the write-up the following Monday.

T**1 said she had no recollection of the comments she supposedly made to Mueller, but admitted it was possible she had said something along those lines. She had no recollection of making any comment to Th##n about bleeding, and strongly doubted that she said any such thing. She explained that she had given birth in May, and had since had suppression injections and had had neither a period nor any bleeding since that time. As for the comment about blowing a panel hard or soft, she admitted saying it, but denied there was any sexual innuendo. Her recollection was that it was John Holbach, not Roger A####a, who asked her to blow off the panel, and it was Holbach to whom she asked the question. She explained that it is possible to regulate the air pressure on the hose, and that if too much pressure is used it might blow the grout out from between the bricks. She acknowledged that there was some laughter from other employees when she said this. John Holbach echoed this testimony.

Miles Mertens testified that the Union was supposed to receive copies of all disciplinary notices, and that the Company would typically give him write-ups of anything that was going to lead to discipline, albeit often late. He said had never seen any type of warning notice to T**1 for offensive language prior to the discharge. In preparation for the arbitration, Mertens said he had interviewed Th##n and A####a and asked them about the timing of the alleged incidents. Th##n said it had occurred a week or two before he reported it, and also commented that T**1 kept the other members of the crew "in stitches" with her comments. A####a told him that the incident with the air hose took place three to five days before he reported it. Mertens testified that he had no reason to doubt the honesty of either A####a or Mueller, and that he did not know Th##n at all and could not offer an opinion about him.

Roger A####a, James Mueller and Jack Th##n all testified to the events as described above. A####a said that he did not tell Mertens that he waited three to five days to report the incident. His reference to three to five days was an attempt to place it in time relative to the discharge. He said the incident took place on the day he reported it. Jack Th##n said he told Mertens that the Grievant kept the other workers "in shocking stitches" and said that she had an odd sense of humor and used more profanity and vulgarity than any of the men could have gotten away with. While he had never seen any written policy on the use of profanity, he felt that it was a matter of mutual respect between employees not to use it, and that the Company discouraged it. He acknowledged that profanity was used, including the term "fuck" and that his usual means of discouraging it was to repeat the language back, word for word, to the person who used it, so they would hear how it sounded. Th##n agreed that he told Mertens he thought a couple of days had passed before he reported the comments, but on reflection he was wrong. He reported it within a few hours of it happening. James Mueller testified that he was aware of the complaint against H++++s when he made his report to Garni, and that it was one of the reasons he reported the Grievant's comments. He felt that she might be trying to drag him into a similar problem. He agreed that there was plenty of profanity used in the plant, and that this was not the first time he had heard the word "bitch" used, though it was the first time he had ever heard someone use it refer to herself.

Regan Schmitt testified that he had no recollection of what he said when he was told the Grievant was being terminated. He expressed the opinion that the majority of the employees in the shop probably disapproved of people using profanity, but agreed that is was not uncommon to hear profanity, including profanity directed from one employee to another, and that it was, in fact, a daily occurrence.

Additional facts, as necessary, are set forth below.

ARGUMENTS OF THE PARTIES

The Position of the Employer

The Employer takes the position that there is ample justification for the discharge and that the grievance should be denied. The Grievant here had several times complained about sexual harassment in the workplace, and the Company had agreed with her complaints and warned the employees involved. She complained about Jeff R*****e's improper words and conduct, and he was put on warning that he would be fired if there was another occurrence. She again complained about him using the term "bitch" to describe her, and he was again warned. He was discharged shortly thereafter, and this was one of the bases. She complained about the Plant Manager, Kelly H++++s, making a reference to her menstrual cycle as the reason for a bad mood, and H++++s was put on warning. Clearly, the Company takes sexual harassment and improper language very seriously, and just as clearly, the Grievant knew this, and knew that employees are given only one warning before termination.

Notwithstanding her knowledge that sexual harassment is taken seriously, and her own aggressive insistence on a workplace free of offensive language, the Grievant herself engaged in three blatantly improper acts in a short span of time. On Wednesday, the day before the Grievant complained against H++++s, Jack Th##n complained to Garni that he should not have to put up with the Grievant saying she was "fucking . . . bleeding" or words to that effect, and that he found such language embarrassing. The next day, Roger A####a reported an incident in which she used sexually suggestive language in response to an order to blow dye off a brick panel, asking whether he wanted her to "blow it slow or fast." A####a was deeply embarrassed by the comment. Later that same day, foreman Jim Mueller complained that she had loudly told a co-worker to just ask him, and he would confirm that she was a "bitch." Mueller was understandably irritated by this, coming from someone who was prone to complaining about others using such language towards her. Every one of these men testified credibly to the fact that they were offended and disturbed by the Grievant's comments, and none of them has any apparent motive to lie.

The Grievant's response to this is that crude language is common in the workplace and that this is just shop talk. This is a hypocritical argument, given that it is she who insisted on and achieved what amounts to a zero tolerance standard for offensive and harassing remarks. Having successfully urged discipline for others who engaged in similar comments, she cannot now claim that she did not know the rules or that the Company is using too high a standard for measuring her own verbal misconduct. The contract allows for immediate discharge for serious offenses, and partly through her urging, the Company had classified sexual harassment as a serious offense. Simply put, she cannot have it both ways.

The Company carefully considered all complaints of inappropriate and offensive language by employees to other employees, and treated these complaints as serious matters. It did so when the Grievant complained about others, and it followed the same course when others complained about her. Its approach was even handed, reasonable and consistent with the rules. Since the Grievant had three offenses under a sexual harassment policy that allows only two, and since she could not plausibly deny her guilt, the Company reasonably determined that she should be discharged. The Arbitrator should reach the same conclusion, and the grievance should be denied.

The Position of the Union

The Union takes the position that there was not just cause for discharge and asks that the Grievant be reinstated and made whole. This Grievant had no relevant prior discipline in her record, yet in the course of two days she went from no discipline to termination. She had been in the plant for two and a half years without incident, yet after she complained about Kelly H++++s, there was a sudden flood of complaints about her offensive language. A####a admitted that he was motivated to complain by the fact that she had complained against others, and Mueller admitted that his complaint was prompted by her complaint against

H++++s. Clearly, this discipline is an effort to retaliate against her for her own complaints. That is made clear by the fact that Garni never mentioned Th##n's complaint when he met with Grievant to discuss H++++s' remarks. If he was interested in deterring offensive language, the normal reaction would have been to ask her how she could be complaining about H++++s when her own comments were offending other employees. Garni did not do so, because he was laying in the weeds, fully intending to turn her own complaints on her.

The Grievant was discharged under a "policy" that subjects sexual harassment to immediate discharge. This is an unwritten policy without standards and without support in the contract. The contract clearly requires progressive discipline for all but the most serious offenses. In practice, the Company's "policy" amounts to allowing Garni to discharge an employee based on his own subjective judgment of what is and is not offensive. This cannot be reconciled with a just cause standard. If an employee is to conform to a rule, there must be some sort of objective standard that he or she can refer to. In the area of offensive language, each individual may have different opinions, and the same word may be offensive or not, depending upon the context in which it is uttered. A####a for example, is clearly a very sensitive person. There is nothing wrong with that, but the fact that he is easily embarrassed doesn't mean that his embarrassment can be equated with someone else's misconduct. The evidence establishes that there is a fair amount of crude language used in the shop, and the Grievant could not be expected to know that a term such as "bitch" — which is used often — would trigger discipline when she used it.

If the Arbitrator steps back and reviews the allegations against the Grievant, none of them individually warrants more than an informal conference and taken together, they would not warrant any serious discipline. The Company is simply responding to its annoyance at the Grievant's complaints. While this may be understandable, it does not meet a just cause standard, and the Arbitrator should, therefore, grant the grievance and reinstate the Grievant.

DISCUSSION

The Company discharged the Grievant for offensive behavior, and at the hearing identified the behavior as sexual harassment. The Company alleges that it has a policy against sexual harassment that calls for one warning and termination for a second offense, and that the Grievant is guilty of three offenses, one more than the policy will allow. The Union claims that there is effectively no policy, and that even if there is, the Grievant did not violate it. In the Union's view, the Grievant is guilty of, at most, vulgarity and the termination is nothing more than retaliation against her for complaining about comments made by the Plant Manager.

The initial question is whether there is an enforceable policy against sexual harassment. If so, the question is whether the Grievant violated that policy or any other disciplinary rules. If so, the final question is whether the Grievant's rule violations constitute just cause for discharge, as opposed to some lesser form of discipline.

1. Is There A Sexual Harassment Policy?

In general terms, a valid work rule is one which (1) regulates conduct reasonably related to a legitimate business concern of the employer, (2) does not conflict either with any express term of the collective bargaining agreement or with the duty to bargain, (3) gives employees reasonably clear notice of the conduct prohibited and the consequences of a violation, and (4) is enforced in a reasonable and consistent manner. 1/

1/ See, for example, Brand, et al, Discipline and Discharge in Arbitration, (BNA, 1998) at pages 72-85; Volz & Goggin, et al, Elkouri & Elkouri: How Arbitration Works, (5th Ed., BNA 1997) at pages 764-769; St. Antoine, et al, The Common Law of The Workplace (BNA, 1998) at pages 166; 186-197; See also, the discussion of parallel factors for determining what constitutes insubordination in Bornstein, et al, Labor and Employment Arbitration, (2d Ed., Matthew Bender, 2000), Chapter 16, Section 16.04[1].

In connection to the legitimate content of the rule and its consistency with the contract, I would observe that the Company has not only the right, but the obligation, to maintain a workplace free of sexual harassment, and in pursuing that duty it can exercise its inherent right to make and enforce reasonable work rules against harassment. Indeed, the contract itself contains a pledge by both parties not to allow illegal discrimination on the basis of sex (Article 25), and this would encompass maintaining a rule against sexual harassment. Having said that, the general right to act to prevent sexual harassment is not *carte blanche* to do whatever the Company wants with the subject, and it does not delete the just cause provision of the contract. In the instant case, the rule as administered has several defects.

The rule described by Garni is an unwritten policy. According to him, the policy prohibits sexual harassment and allows two strikes. On the first offense, the employee is given a disciplinary warning, and is told that a second offense will lead to immediate termination, although actual termination is subject to his determination of the circumstances surrounding the second offense. Being unwritten, the policy is not posted anywhere, and according to Garni employees become aware of it while they are receiving the warning after their first offense. While, on its face, this would appear to be a defect in notice to employees, it bears remembering that sexual harassment in the workplace is something that has long been widely recognized as a problem, and employees can reasonably be expected to know that it is prohibited. A ban on conduct that is plainly sexual harassment is not some technical or obscure regulation of behavior that an employee would have to have specific notice of before discipline could be imposed, any more than a ban on fist fights in the workplace has to be posted in order to be enforced. Thus, the fact that the prohibition on sexual harassment has not been reduced to writing does not render it invalid. 2/

2/ Having observed that a rule against sexual harassment is enforceable even if unwritten, the lack of a written rule nonetheless draws into question the scope of the rule, and whether employees can possibly have notice of everything that is covered by the fairly broad term "sexual harassment." This is discussed in greater detail below.

The ban on harassment is only one aspect of the alleged rule. The second is the "two-strikes" provision, whereby someone who is guilty of sexual harassment is warned that a second offense will lead to discharge. In this respect, the alleged rule is something of a hybrid between the two existing categories of rules listed in the Appendix to the contract. For offenses such as absenteeism, loafing, horseplay and the like, the Company uses a three step progression of discipline over a six months, with a written warning for the first offense, a suspension for the second, and discharge for the third. For serious offenses, including dishonesty, drunkenness, possession or use of drugs, recklessness and carrying unauthorized passengers, immediate discharge is the rule. There is a very substantial question in this record whether employees generally know or should know this aspect of the rule. Garni testified that he tells people that they will be discharged for a second violation, and that the Grievant knew this because she was specifically told of it when R*****e was given this warning in December of 1998.

From the record, it appears that there have been only four cases in which this unwritten rule was arguably invoked: the two involving R*****e and the Grievant, the case involving Kelly H++++s and the instant case. In the first case involving R*****e, I believe Garni's testimony that he warned R*****e that he was facing discharge, and that the Grievant was advised that this warning was given. It is confirmed by his notes of the meeting with her, and it makes sense that he would have done this, given the seriousness of the allegations against R*****e. Even though I believe Garni on this point, it does not prove that the Grievant had notice that any and all instances of sexual harassment, no matter what they consisted of, would lead to discharge in the second instance. That was not a case of innuendo or double entendre. R*****e was accused of improperly touching the Grievant as well as using inappropriate language to her. The wrongfulness of sexual touching is absolutely clear-cut, and such conduct violates not only the mores of the workplace, but the criminal laws of the State. Advising the Grievant that R*****e was on a final warning for this conduct would not communicate to most people the broader point that anything that could be characterized as sexual harassment would be subject to a two strikes rule.

The second instance involving R*****e and the Grievant in early March of 1999 does nothing to show that employees could expect a two strikes rule to be enforced for sexual harassment. The incident, on its face, had little to do with sexual harassment. It was a conflict between two employees, with R*****e calling her a "bitch" and her calling him a "low-life" and telling him to "get the fuck off" of a piece of equipment. 3/ "Bitch" may be a

gender-specific insult, in the same sense that "son-of-a-bitch" would be, but there is nothing particularly sexual about the use of the terms as insults. 4/ Garni testified that this incident implicated the sexual harassment policy, but his own write-up characterized the warnings he gave as being for the use of offensive language. Moreover, R*****e was not fired for this incident, notwithstanding the final warning given him in December. This buttresses the conclusion that the March 1999 incident was not treated at the time as having anything to do with sexual harassment.

3/ Even if the terminology may be susceptible to a gender specific meaning, bad-mouthing between two employees because of personal animosity, rather than hostility based on gender, is not sexual harassment. See STATE OF WASHINGTON, 98 LA 440 (GRIFFIN, 1992); PARAGON CABLE, 100 LA 905 (DREIZEN, 1993).

4/ It is the case, however, that the regular use of the term "bitch" to refer to a female co-worker may, in the context of other inappropriate comments and conduct, be evidence of sexual harassment. See CAN TEX INDUSTRIES, 90 LA 1230 (SHEARER, 1988).

The two strikes aspect of the alleged policy is also not in evidence in the Kelly H++++s case. The Grievant complained that his reference to her mood being influenced by her menstrual cycle was sexual harassment. Whether that is an accurate assessment or not, Garni says that he took it as being a complaint of sexual harassment and reprimanded H++++s under the sexual harassment policy. However, the written warning he gave H++++s said nothing about him being fired if he made such comments again, and neither the Grievant nor Garni, both of whom were present at the meeting with H++++s, claimed that anything along those lines was said to H++++s. If, as claimed, the two strikes rule is a fundamental aspect of the Company's sexual harassment policy, one would expect it to have been mentioned.

I cannot find that the unwritten policy puts employees on notice that the second offense of sexual harassment of any type will trigger discharge, nor can I conclude that the Grievant was on notice of this after the first R*****e incident. The second incident with R*****e did not, under any normal interpretation of the facts, involve sexual harassment, nor did the discipline resulting from that incident characterize it as sexual harassment. The incident with Kelly H++++s did involve a complaint of sexual harassment, yet there was no mention of a two strikes policy when H++++s was warned against making similar remarks again. Thus, aside from Garni's assertion, there is no proof that the unwritten policy actually requires discharge for a second offense, and there is no reason to believe that employees would have notice of the enhanced penalties contemplated by Garni.

The Company asserts that, notwithstanding the specific terms of the policy, the penalty of discharge is appropriate in cases of sexual harassment, even in the first instance, because the

disciplinary notice appended to the contract allows immediate discharge for any offenses that are "of equal severity" to those specifically listed (dishonesty, drunkenness, possession or use of drugs, recklessness and carrying unauthorized passengers). There are cases where this is almost certainly a fair analogy. A lead worker who conditions favorable job assignments on sexual favors, or an employee who grabs another employee's genitals in a sexual way, may clearly be said to have engaged in very serious misconduct. /5 As with the specific bases for summary dismissal in the contract, these are acts which are plainly wrong, and which any reasonable person would expect to have the most serious consequences. However, sexual harassment also encompasses behavior which, while inappropriate, is less egregious than these examples, and less analogous to the list of reasons for immediate discharge. There are patterns of comments and conduct that, repeated over time, may create a hostile environment, even though any individual comment or action would not, in and of itself, be of such gravity as to warrant summary discharge. 6/ In this case, for example, it is inconceivable that Kelly H++++s would have been summarily discharged for having attributed the Grievant's bad mood to her menstrual cycle, even though the parties characterized this as falling within the scope of the sexual harassment rule.

5/ See, for example, CITY OF ORLANDO, 109 LA 1174 (Sweeney, 1997); U.S. DEPT. OF LABOR, 98 LA 1129 (BARNETT, 1992); SHELL PIPE LINE, 97 LA 957 (BARONI, 1991); ROCKWELL INTERNATIONAL, 85 LA 246 (FELDMAN, 1985).

6/ MERITOR SAVINGS BANK v. VINSON, 477 U.S. 57, 106 S. Ct. 2399, 40 FEP 1822 (1986); STANLEY G. FLAGG CO., 90 LA 1176 (VALENTINE, 1988).

While an unwritten rule against sexual harassment is enforceable and may, in egregious cases, warrant immediate termination, by being unwritten the rule relies heavily on what common sense would tell an employee as to conduct and its likely consequences. Particularly in the area of appropriate penalty, this requires a close examination of the specific conduct and/or the particular words used, and the context in which they were used, before a particular act of discipline can be judged consistent with a just cause standard.

2. Did The Grievant's Conduct Constitute Sexual Harassment?

The Grievant is accused of three violations of the sexual harassment policy, in the comments she made to Th##n, A####a and Mueller. These would be her first violations of the policy since, as discussed above, her clash with R*****e in March of 1999 cannot plausibly be characterized as having anything to do with gender bias. She is specifically accused of:

- Telling Th##n she was bleeding like a fucking pig, in connection with her period;

- Asking A####a whether "he would like her to blow it hard or soft" when he told her to use an air hose to blow dye off a brick panel;
- Loudly telling a co-worker, in Mueller's presence, that Mueller would confirm that she was a "bitch";

The Grievant testified that she had no specific recollection of the comment to Th##n, but that she doubted she would have said it, since she was on medication that suppressed her period. She admitted the "hard or soft" comment, but said it was directed to Holbach, not A####a, and that it was merely an inquiry about the degree of air pressure he wanted her to use. As to the comment to Mueller, she conceded she may have said it, though she again had no specific recollection.

A.

Th##n reported that the Grievant told him she was "bleeding like a fucking pig" following her period. Assuming for the sake of argument that the comment was made, it may have embarrassed Th##n to hear a woman make reference to her menstrual cycle, and it would certainly have been a crude thing to say. It is not clear, however, how it becomes sexual harassment. Not every reference to distinctions between male and female anatomy raise questions of sexual harassment, and the comment reported by Th##n has no sexual overtones. There is no implicit invitation nor any reference to sex at all. It is not part of a pattern of uninvited discussion of intimate matters by the Grievant. Unlike the comment made by H++++s about the Grievant's menstrual cycle, it does not seek to explain a work related problem in terms of a gender stereotype. I can discern nothing whatsoever about the comment that would bring it into the scope of a rule — formal or informal — prohibiting sexual harassment. It may have been unwelcome and, as noted, was certainly crude. However, Th##n himself testified that profane and offensive language was discouraged at the plant by peer pressure, including by repeating the language back to the speaker, rather than through formal discipline.

The Grievant's comment to Th##n was crude and inappropriate, but it was not sexual harassment. It was at most a violation of the rule against profanity and offensive language. However, that rule has not been regularly enforced solely to regulate language. The record shows only one prior instance of discipline for offensive language, and that was in response to a continuing and escalating conflict between R*****e and the Grievant in 1999. There the offensive language was plainly directed at the other employee, and threatened to exacerbate the conflict and interfere with the operations of the Company. Even given that heightened interest by the Company, it is not clear that the Grievant was formally disciplined. She said she was not aware of any discipline against her for the R*****e incident, and Mertens testified credibly that he had not received a copy of any warning to the Grievant, which would have been required if she was being formally disciplined, as opposed to merely being counseled. Absent clear advance notice to all employees that the rule against profanity and offensive language would be strictly and uniformly enforced, I cannot find that this warrants formal discipline.

B.

Turning to Roger A####a's report that the Grievant asked him whether he wanted her to "blow it hard or soft" I credit A####a's testimony over that of the Grievant and Holbach. A####a was a sincere witness, and all parties agreed that his personal history was inconsistent with untruthfulness. Moreover, the explanation offered by the Grievant and Holbach makes no sense. According to them, it is important to know how much air pressure should be used because blowing the brick panel "hard" i.e. using considerable air pressure, would dislodge the grout from between the bricks. Since she claimed to be familiar with the procedure and the equipment, she presumably knew enough to use less pressure so as not to damage the product. There was no reason for her to ask the question, other than as sexual innuendo. A####a's reticence would have made him a likely candidate for such teasing, and I conclude that she intentionally asked the question to embarrass him. Had the roles been reversed, and a male lead worker had made this kind of comment to T**1, she would have had a legitimate complaint. Men are just as much entitled to be free of comments of a sexual nature as are women, and I find that T**1 violated the policy against sexual harassment by deliberately embarrassing A####a in front of his co-workers. 7/

7/ Title VII protects men as well as women. See ONCALE v. SUNDOWNER OFFSHORE SERVICES, 532 U.S. 75, 118 S. Ct. 998 (1998). Certainly this single incident would not have sufficed to create a hostile environment for A####a. Before sexual harassment on the basis of a hostile environment would become actionable by A####a, there would have to be proof that the Grievant's behavior was sufficiently severe and pervasive to alter the working environment. However, the Employer's interest is in preventing the creation of a hostile environment and it cannot be forced to wait for a hostile environment to be created before taking action. See SAFEWAY, 112 LA 1050 (SILVER, 1999).

C.

With respect to the comment made to Mueller, no serious argument can be made that this in any way implicates a policy against sexual harassment. As previously noted, the term "bitch" may be a gender specific vulgarity, but the mere utterance of the term does not constitute sexual harassment. Here, the comment was made by the Grievant, in reference to herself. Mueller concedes that he reported it to Garni in part because the Grievant had reported others, notably H++++s, for making inappropriate gender-specific comments, and because by inviting him to respond to the characterization, he felt she was trying to put him in a position where she could make a similar complaint against him. While it may have struck Mueller and others that there was a certain poetic justice in giving the Grievant a taste of her own medicine, the fact is that her own comment about her being a bitch simply has no sexual overtone, nor can it be said to contribute to an environment that is hostile to female employees. Certainly, this incident involves the use of a vulgarity, and implicates the rule against the use of profanity, indecency or abuse of other employees. However, as discussed above, the parties concede that profanity, while not sanctioned, is not unknown in this work place and is primarily regulated by peer pressure. Whether it is subject to formal discipline depends upon the context in which it is used, and aside from the March 1999 incident, there is no evidence of

formal or informal discipline for offensive language. Without endorsing the Grievant's comments, I conclude that they are properly characterized as shop talk, and that no employee would reasonably expect to be subject to formal discipline simply for uttering the word "bitch."

D.

Of the charges leveled against the Grievant, two involve the use of offensive or vulgar language, but do not have any overtones of sexual harassment. The rule against offensive language is principally enforced through informal pressure from other employees, and neither the Grievant nor any other employee would reasonably expect formal discipline, much less termination, as a result of such comments. The third allegation of sexual harassment is proved on the record. The Grievant deliberately embarrassed Roger A####a by asking a question that was intended to suggest fellatio. While plainly inappropriate, this is not the type of sexual harassment that would typically lead to termination for a first offense. It does not involve physical touching, *quid pro quo* demands or any other egregious misconduct. Even under the Company's unwritten policy, it would demand a warning as a first offense. This is also the appropriate first level of discipline under the progression of discipline for abusive conduct to other employees. Thus, under any theory of the case, the appropriate penalty is a written warning. Accordingly, I conclude that the Grievant was disciplined for just cause, but was not discharged for just cause, and that the appropriate remedy is to reduce the discharge to a written warning, reinstate her to her former position, and make her whole for her losses.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

1. The Employer had just cause to discipline the Grievant for sexual harassment directed at Roger A####a;

2. The Employer did not have just cause to discipline the Grievant for sexual harassment directed at either Jack Th##n or James Mueller;

3. The Employer did not have just cause to discharge the Grievant;

4. The appropriate remedy is to immediately:
   (a) reduce the discharge to a written warning;
   (b) reinstate the Grievant to her former position;
   (c) make her whole for her losses.

Dated at Racine, Wisconsin, this 25th day of January, 2001.

Daniel Nielsen /s/

Daniel Nielsen, Arbitrator

DJN/ans
6184.doc