BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LABORERS' UNION LOCAL NO. 464

and

MID-STATES CONCRETE PRODUCTS COMPANY

Case 10
No. 63869
A-6125

(Jason Plummer Discharge Grievance)

Appearances:

Dan Burke and **Karl Markgraf**, Assistant Business Managers, Laborers' Union Local No. 464, appeared on behalf of the Union.

Kevin Wald, Representative, Mid-States Concrete Products Company, appeared on behalf of the Company.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and Company respectively, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to decide a grievance. A hearing, which was not transcribed, was held on September 7, 2004, in South Beloit, Illinois. The parties did not file briefs. Based on the entire record, the undersigned issues the following Award.

ISSUE

The undersigned frames the issue as follows:

Did the Company have good cause to discharge Jason Plummer on June 29, 2004? If not, what is the remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 2004-2007 collective bargaining agreement contains the following pertinent provision:

ARTICLE IX. DISCHARGE AND SUSPENSION

> The employer may discharge any employee for good cause. An employee charged with an offense justifying immediate discharge, will be informed of such offense in writing at the time of his discharge, and a copy thereof shall be sent to the Union. All discharges must be made in the presence of employee's Stewards. The Employer shall give at least one (1) warning notice in writing of a complaint for other offenses (those not involving immediate discharge) against such employee, to the employee and the Union. If the offense complained of in the warning letter is not repeated within six (6) months from the date of the warning letter, then such warning letter will be deemed to have served its purpose and shall no longer be in effect.
>
> Discharge without a warning notice is authorized in cases of:
>
> . . .
>
> 8. Conduct that denigrates or shows hostility or aversion toward an individual because of his or her protected basis.
>
> . . .

BACKGROUND

The Company manufactures Flexicore concrete slabs. The Union is the exclusive collective bargaining representative for certain Company employees. The grievant in this case, Jason Plummer, was a member of that bargaining unit until his discharge on June 29, 2004. He had worked for the Company since 1997 as a forklift driver. Prior to his discharge, he had never been disciplined for sexual harassment.

In October, 2003, the Company's Human Resources and Safety Director, Shannon Sharmmer, started getting anonymous notes at work containing sexual content. These notes were placed in her cubicle on her desk. The notes are not contained in the record. Company officials suspected that Nate Holmes, a bargaining unit employee, was placing the notes on Sharmmer's desk and confronted him with their suspicions that he (Holmes) was the person responsible for the anonymous notes being left on Sharmmer's desk. Holmes denied that he was

responsible for the notes. Company officials decided that while they could not prove Holmes was the person responsible for the notes being left on Sharmmer's desk, they nevertheless gave him a written warning. That warning was not grieved.

After this action was taken, the notes to Sharmmer stopped.

Sharmmer then held some in-service training sessions at work for all employees. The topic which was covered in these training sessions was harassment, including sexual harassment. At these meetings, Sharmmer reviewed in detail the Company's harassment policy which is contained in the Company's Employee Handbook. That policy covers sexual harassment. She informed everyone at these meetings that employees who engaged in sexual harassment would be disciplined, up to and including discharge.

Following these meetings, the Company reiterated this message by placing a written notice in the employees' paycheck which said that the Company would not tolerate sexual harassment.

It is against this factual backdrop that the following occurred.

FACTS

In late June, 2004 (NOTE: all dates hereinafter occurred in 2004), Sharmmer started getting anonymous notes again. All of the notes were left in her cubicle at work by her computer, specifically just below her mouse pad. All were handwritten on scraps of paper which had the same 1½" cut along the bottom edge of the paper. Sharmmer found the notes each day when she reported for work.

Sharmmer found the first note either June 22 or 23. It said the following:

> You are hot! I would like to meet you somewhere outside work. I am young and do not work in the office. If interested, leave a place to meet under your mouse.
>
> P.S. I wont tell anyone!

After Sharmmer found the note, she informed her supervisor, Company Vice President Hagen Harker, about it. He, in turn, consulted with other Company officials about it, and they decided to leave their own note for the anonymous note writer. They took a yellow post-it stickable note and wrote the following on it: "Who are you?" They placed this note in Sharmmer's cubicle next to her computer mouse.

On June 24, Sharmmer noticed that the note asking "Who are you?" had been taken from her cubicle. In its place was a second anonymous note which said the following:

> I really would like to see you outside work, this isnt a prank or joke. I am vary interested in you! I know about Jake, he's a jerk. Please tell me where I can meet you. Leave when and where under your mouse pad.
>
> Hope
> To
> Here
> From
> You

Sharmmer found a third anonymous note on June 25. It said the following:

> Interested?
>
> I joke w/you at all the safety meetings. I hope this doesn't upset you. If I tell you at work and anyone finds out I dont want it to be spread around so I loose my job.

That same day, June 25, Sharmmer left work shortly after Noon because that was the end of her Friday workday. So did bargaining unit employee Jason Plummer. Both Sharmmer and Plummer got in their vehicles and left the Company parking lot about the same time. About a half mile from the plant, Sharmmer was stopped at a stop light on a major street in South Beloit when Plummer's vehicle pulled up next to her vehicle in the other lane. Sharmmer knew Plummer from work. Sharmmer looked at Plummer and when she did, he (Plummer) held something up so that Sharmmer could see it. The item that he held up for Sharmmer to see was the yellow post-it note that asked "Who are you?" Then, Plummer pointed at himself. No words were exchanged between the two in this encounter.

About an hour later, Sharmmer received a phone call at her home. Plummer identified himself as the caller. He told her he wanted to talk about the notes he had left for her at work. Sharmmer cut off the conversation, told him to stop all of this, and hung up the phone. Sharmmer then called her husband and told him what Plummer had just done.

On Sunday, June 27, Sharmmer received a phone call wherein the caller did not identify himself. As Sharmmer waited for the caller to identify himself, she heard a song being played into the phone. The song had lyrics which contained the phrase: "I just called to say I love you." Sharmmer hung up the phone.

The next day, Monday, June 28, Company officials Joel Purdy and Kevin Wald came into the office at 5 a.m. and went into Sharmmer's cubicle. There, they found the following note:

> Im sorry if I upset you. I dont want that. I dont want any commitments or anything, I know you're married. Im not like Jake who would go and tell everyone. I wish you and I could work something out. There is no crime in someone being interested in you. Stop & look at yourself.
>
> Please respond back.

The next day, Tuesday, June 29, Company officials Purdy and Wald came into work at 5 a.m. for the express purpose of staking out Sharmmer's cubicle to see if they could determine who was leaving the anonymous notes for her. They knew that Sharmmer would not be at her cubicle at that time because her work day does not start until 8:15. They initially went into her cubicle and checked to see if there was already a note in there. There was not. Then, they both positioned themselves in the building so that they had a line of sight to Sharmmer's cubicle and could see who went in and out of her (Sharmmer's) cubicle. Then, they waited and watched. They saw an employee go into Sharmmer's cubicle. After the employee left, Purdy and Wald went into the cubicle looking for a note. There was none. They did the same thing after a second employee went into Sharmmer's cubicle. Once again, there was no note. The process was repeated a third and fourth time. Purdy and Wald watched as different employees went into Sharmmer's cubicle. Each time after the employee left, Purdy and Wald went in looking for a note. There was none. Finally, about 6 a.m., Purdy and Wald watched as Jason Plummer went into Sharmmer's cubicle. After he left her cubicle, Purdy and Wald went into her cubicle and looked for a note. This time they found a note, which was left by the computer, just like the other notes had been. The note they found said the following:

> I have a question. Why should you not know who I am? I would think you would be flattered to have someone so interested in you. What is the harm in secretly seeing someone w/o people knowing? It doesnt bother me you have a husband, he's a very lucky man! Ive never met any other woman that is as beautiful and outgoing as you. Just so you know Im a younger guy and dont have problems finding women, you're the one Im interested in. I would like to see you at your convenience. Everyone tells me to try for Amber, but I think she's stuck on herself and snobby. You are the better choice!

After finding this note, Company officials called Union officials and informed them of the situation referenced above.

Later that day, Plummer was called into the office for a meeting wherein Company officials asked him about the notes left in Sharmmer's cubicle, the car incident with Sharmmer, and the phone calls to Sharmmer. Plummer responded by denying everything and said that all the accusations against him were wrong. Company officials did not credit his denial. Instead, they decided that he was the author of the notes that had been found in Sharmmer's cubicle and that he had called Sharmmer at her home. Company officials further decided that Plummer's conduct violated the Company's harassment policy and warranted discharge. Plummer was discharged that same day. His written discharge notice said that the reason he was terminated was "for violation of company and union harassment policy."

The next day, June 30, Sharmmer filed a police report with the Winnebago County, Illinois Sheriff's Department concerning Plummer's conduct. As of the date of the hearing, no criminal charges had been brought against Plummer.

On July 2, the following typed note was found on Supervisor Dan Rippl's desk at work:

> Hello again! Guess what? You got the wrong guy. I kinda figured something like this would happen. All I wanted was a relationship with you. As for poor Jason Plummer he always was an asshole, but he did not have anything to do with the notes. Now I know you are comparing handwriting so this is the last note you will ever get from me. Im sorry someone had to take a fall for me, but I guess I will have to live with that!

Following his discharge, the Union filed a grievance on Plummer's behalf. The grievance was not resolved and was appealed to arbitration.

At the hearing, Company official Wald speculated that Plummer was the author of the note found on July 2; that he (Plummer) wrote it to distract attention from himself; and that while Plummer was not supposed to be in the Company's office following his discharge, he was nevertheless able to gain access to the Company's building and place the note in Rippl's office via a missing Company building key.

At the hearing, Sharmmer testified that she considered the notes left for her to be humiliating and sexual; that the notes were unwanted, unwelcome and unsolicited; and that she felt threatened and scared by Plummer's phone call to her.

Plummer did not testify at the hearing.

DISCUSSION

Article IX of the parties' collective bargaining agreement provides that the Company "may discharge any employee for good cause". What happened here is that the Company discharged Plummer. Given that disciplinary action, the obvious question to be answered here is whether the Company had good cause for doing so.

As is normally the case, the term "good cause" is not defined in the parties' labor agreement. While the term is undefined, a widely understood and applied analytical framework has been developed over the years through numerous arbitral decisions. That analytical framework consists of two basic elements: the first is whether the employer proved the employee's misconduct, and the second, assuming this showing of wrongdoing is made, is whether the employer established that the discipline which it imposed was justified under all the relevant facts and circumstances.

As just noted, the first part of a cause analysis requires a determination of whether the employer proved the employee's misconduct. Attention is now turned to making that call.

The initial question which needs to be addressed and answered is who wrote the notes which were placed in Sharmmer's cubicle between June 22 and 29. I find it was Plummer who wrote the notes. Here's why. First, Plummer revealed himself to Sharmmer as the note writer at the stop light on June 25 when he held up the yellow post-it note which asked "Who are you?" and pointed at himself. Sharmmer recognized that note as the one which had been left in her cubicle. By holding up that particular note which could only have come from Sharmmer's cubicle, and then pointing at himself, Plummer identified himself to Sharmmer as the note writer. Said another way, by his own conduct, Plummer implicitly told Sharmmer that he was the note writer. Second, an hour later, Plummer called Sharmmer at her home and identified himself as the caller. He then specifically told her that he wanted to talk about the notes he had left for her. While Plummer's admission to Sharmmer at the stop light that he was the note writer was implicit, his admission to her in the phone call that he was the note writer was explicit. It could not have been clearer. Sharmmer's account of these two incidents was not contradicted. Third, aside from these two admissions by Plummer himself to Sharmmer that he was the note writer, Company officials Purdy and Wald were able to independently verify that Plummer was the note writer as a result of their stakeout of Sharmmer's cubicle on June 29. That day, they waited and watched as four employees went into Sharmmer's cubicle. After each of the four employees left, they went into her cubicle and checked for a note. There were no notes. Then, they watched Plummer go into Sharmmer's cubicle. After he left, they checked for a note. This time though, there was a note. The inference is obvious – Plummer left the note in Sharmmer's cubicle. Under the circumstances, it could not have been anyone else because there was no note in Sharmmer's cubicle before he

(Plummer) went in. Additionally, the note which Purdy and Wald found was written in the

same handwritten style, on the same type paper, and left in the same location (next to the computer mouse pad) as the four prior notes which had been left for Sharmmer. Their account of this incident was not contradicted either. Given the foregoing, I find, as did the Company, that Plummer wrote the notes which were found in Sharmmer's cubicle.

In so finding, I have considered the following defenses offered by the Union which are intended to raise doubts about whether Plummer was the note writer. None of them have been found persuasive.

First, the Union contends that the Company did not prove, via a handwriting expert, that Plummer was the note writer. In my view, this argument misses the mark in this case for the following simple reason. While there are no doubt factual situations where an employer needs to use a handwriting expert to connect a written document to a particular employee, this is not such a case. The reason was noted in the preceding paragraph, namely that in this case, Plummer twice identified himself to Sharmmer as the note writer: first at the stop light and second in his phone call to her. Given his admission, it was unnecessary, in this particular case, for the Company to employ a handwriting expert to connect Plummer to the notes. He did that himself.

Second, the Union calls attention to the typed note found on Rippl's desk on July 2. That note indicates, of course, that Plummer was not the note writer. Quite frankly, I don't know what to make of that note. While the note certainly raises the question of whether Plummer was the note writer, I find that this note does not outweigh the critical fact that it was Plummer who twice identified himself as the note writer to Sharmmer. The typed note does not change that.

Third, the Union asserts that when Purdy and Wald staked out Sharmmer's cubicle on June 29, they did not actually see Plummer place the note by Sharmmer's computer mouse pad. For the purpose of discussion, it is assumed that that's true. However, the fact that Purdy and Wald did not actually see Plummer place the note by Sharmmer's mouse pad does not change this critical fact: there was no note by Sharmmer's computer mouse pad before Plummer went into Sharmmer's cubicle but there was after he left. The note had to have been placed there by Plummer.

The focus now turns to the content of the notes which Plummer left for Sharmmer. First, at the hearing, the Union asserted that the notes did not contain sexually explicit language and implied this was significant. However, words do not have to be sexually explicit to have sexual content. Take, for example, the first phrase which was used in the first note: "You are hot!" While that phrase is not sexually explicit per se, it certainly has sexual content and meaning. Sharmmer felt that all the notes she received had an underlying sexual content.

Since Sharmmer was the recipient of all the notes, her views on their content are entitled to

great weight. Second, Sharmmer testified that she found the notes intimidating and humiliating. The undersigned can certainly see why. Third, this was not a situation where the notes were wanted, welcome or solicited. Sharmmer testified without contradiction that the notes were unwanted, unwelcome and unsolicited. Given the foregoing, it is held that the notes' contents were inappropriate for the workplace. It was misconduct for Plummer to leave the notes for Sharmmer.

Having found that Plummer engaged in the conduct complained of, I want to expound further on one point. I am not saying that it was misconduct, per se, for Plummer to hold up a note while sitting in a car at a stop light or to call Sharmmer on the phone. Depending on the factual context, those two things could be completely innocent and harmless acts. Here, though, they were not innocent and harmless acts because they were part of Plummer's stalker-like conduct toward Sharmmer. Take the phone call, for example. It would be one thing if the two routinely exchanged phone calls with one another. That was not the case though. Insofar as the record shows, Plummer had never called Sharmmer before, and vice-versa. When Plummer called Sharmmer, he made it crystal clear why he was calling, namely to talk about the notes he had left for her. Sharmmer's response to Plummer was blunt: she cut him off, blew him off and hung up the phone. Then, she called her husband and told him what had just happened. Sharmmer testified she felt physically threatened by Plummer's phone call and afterwards was scared and fearful of her personal safety. Once again, I can understand why. While Plummer's notes had been limited to the workplace, Plummer's phone call extended himself into Sharmmer's personal life at home. This crossed the proverbial line.

The next question is whether Plummer's conduct warranted discipline. I find that it did. Here's why. Employers obviously have a legitimate and justifiable interest in preventing sexual harassment. To begin with, it's the law. Employers that tolerate such conduct by their employees expose themselves to legal and financial risks for doing so. Aside from being prohibited by state and federal law, sexual harassment is bad for business because it is detrimental to the working environment, especially if it involves a member of management. That is why the Company has adopted a harassment policy and placed it in the Employee Handbook. On page 8 of the Handbook, it specifies thus:

> Harassment, including sexual harassment is contrary to the basic standards of conduct between individuals and is prohibited by federal and state law. It will constitute a violation of Mid-States Concrete Products Company's policy for any employee to engage in any of the following acts or behaviors as defined below and such misconduct will be subject to corrective action up to and including termination.

That section then elaborates, in great detail, exactly what constitutes sexual harassment and

lists numerous "behaviors" that are specifically prohibited. One of the "behaviors" which is

prohibited is "use of suggestive comments, sexual language, obscene gender-related comments, or jokes". As the Company sees it, Plummer's conduct at issue here fits into that category of prohibited behavior. I agree, and find that Plummer's conduct toward Sharmmer constituted sexual harassment which violated the policy just referenced.

The second part of a cause analysis requires that the Employer establish that the penalty imposed for the employee's wrongdoing was appropriate under the relevant facts and circumstances. In reviewing the appropriateness of discipline under a cause standard, arbitrators generally consider the notions of progressive discipline, due process protection and disparate treatment. The undersigned will do likewise in reviewing the appropriateness of the discipline imposed here (i.e. discharge). Based on the following rationale, I conclude discharge was appropriate here.

First, while Article IX specifies that the normal progressive disciplinary sequence is for employees to receive at least one written warning prior to discharge, that does not mean every disciplinary situation must follow this sequence. Some misconduct is considered so serious that an employer does not have to follow progressive discipline. This disciplinary principle is incorporated into this labor agreement in the second paragraph of Article IX wherein it provides that "discharge without a warning notice is authorized" in certain cases. The last of the eight categories listed is "conduct that denigrates or shows hostility or aversion toward an individual because of his or her protected status." The Company concluded that Plummer's misconduct falls into that summary discharge category. The Union offered no contractual reason why that decision should be overturned. Consequently, the Company's decision that Plummer's misconduct warranted summary discharge stands.

Next, there is no evidence that Plummer was denied due process before discipline was imposed. This finding is based on the following facts. On June 29, Company officials called Union officials and informed them of their belief that Plummer was responsible for leaving the notes for Sharmmer. An investigatory meting was held that same day. During that meeting, Plummer was asked about the notes left in Sharmmer's cubicle, the car incident with Sharmmer and the phone call to Sharmmer. In short, he was given the opportunity to tell his side of the story. He chose to simply deny everything. In my view, there is nothing in the foregoing facts that raise any so-called red flags regarding procedural due process problems. Accordingly, I find that the Company gave Plummer due process before it imposed discipline.

Finally, I find that Plummer was not subjected to disparate treatment in terms of the penalty imposed. In so finding, I am well aware that another employee, Nate Holmes, was previously disciplined for leaving anonymous notes for Sharmmer which contained sexual content. Holmes got a written warning while Plummer, of course, was discharged for his misconduct. Obviously, that's a big difference in terms of the punishment imposed. However,

in order to establish disparate treatment, it is necessary to do more than simply show that one

employee was treated differently than another employee in terms of the penalty imposed. Specifically, it must also be shown that the factual circumstances involved are similar. That was not shown here. First, the notes which Sharmmer received in October, 2003 are not contained in this record. That being so, it has not been possible for the undersigned to compare those notes, and specifically their content, with the notes which Plummer left for Sharmmer in June, 2004. Second, in the October, 2003 incident, Company officials acknowledged they could not prove who was responsible for leaving notes for Sharmmer. They thought it was Holmes, but they could not prove it. Holmes was given a written warning, which was not grieved. In this case though, Company officials were thoroughly convinced that they had the person responsible, and that they could prove it. Thus, there was a big difference in the level of proof that the Company had in the two cases: in Holmes' case, the Company did not have proof of his involvement – just speculation – but it did have proof of Plummer's involvement. Third, insofar as the record shows, Holmes never called Sharmmer at home to talk about the notes, the way Plummer did. Given these dissimilarities between the two cases, there was a logical and non-discriminatory basis for the Company's decision to impose different levels of discipline on Holmes and Plummer.

Accordingly, then, it is held that the severity of the discipline imposed here (i.e. discharge) was not excessive, disproportionate to the offense, or an abuse of management discretion, but rather was reasonably related to the grievant's proven misconduct. The fact that Plummer has not been charged with a crime for his misconduct is not sufficient reason to alter this conclusion. Additionally, Plummer's length of employment with the Company (seven years) is not sufficient reason to alter this conclusion either. The Company therefore had good cause to discharge Plummer.

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

AWARD

That the Company had good cause to discharge Jason Plummer on June 29, 2004. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 28th day of September, 2004.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc

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