

174

IN THE MATTER OF ARBITRATION
UNDER THE 1986-1989 CONTRACT

Hearing
3-22-88

Between:

STATE OF OHIO
(DEPARTMENT OF TRANSPORTATION)

THE EMPLOYER

-and-

THE OHIO CIVIL SERVICE
EMPLOYEES ASSOCIATION
LOCAL NO. 11, AFSCME,
AFL-CIO

THE UNION

GRIEVANCE NO. 30-86-D10

OCB GRIEVANCE NO. G-87-0335

ND 583

GRIEVANT: DELBERT MATHENY

Before: NICHOLAS DUDA, JR., ARBITRATOR

OPINION AND AWARD:

April 9, 1988

CASE DATA**SUBJECT**

Thirty day suspension for alleged sexual harassment.

APPEARANCES**FOR THE EMPLOYER**

Eugene Brundige, Deputy Director, Ohio Department of Administrative Services, Presenting the Case

Warren J. Smith, Chairman, Ohio Industrial Commission, former Director of Ohio's Department of Transportation (ODOT)

Mary Abel, Deputy Director, ODOT

William T. Johnson, Administrative Assistant, Office of Collective Bargaining

T___, Engineering Assistant I, ODOT District #10, Marietta

Darry Michael, Highway Worker, ODOT District #10, Athens Garage

Paul Moore, Route Marker II, Athens Garage

Tony Brooks, Equipment Operator II, Athens Garage

Kenny Meeks, Equipment Operator I, Athens Garage

Andrew M. Bycofski, Equipment Operator, Athens Garage

FOR THE UNION

Daniel S. Smith, General Counsel, Presenting the Case

Max Adkins, Former Superintendent, ODOT District #10, Athens County Garage

Delbert Matheny, Equipment Operator I, Athens Garage, Grievant

John Pallo, Highway Worker IV/Crewleader, Athens Garage

Jeffrey L. Robinson, Caretaker, Athens Garage

Donna Ahle, Highway Worker I, Athens Garage

PRESENT AT HEARING DURING TESTIMONY OF T. BURNETTE

Michael S. Kolman, Attorney for T. Burnette

David Burnette, Athens City Policeman, Husband of T. Burnette

BACKGROUND

On November 21, 1986 the Director of Ohio's Department of Transportation suspended Grievant by the following letter:

...you are hereby suspended from employment...for a period of thirty (30) days...

...it has been determined that just cause exists for this action.

The charges you have been found in violation include:

Directive A301, 5 - Intentional acts of discrimination or insult on the basis of race, color, sex, age, religion, national origin, sexual orientation or handicap....

Further infractions may lead to further discipline up to and including termination.

GRIEVANCE FILED DECEMBER 1, 1986

WHAT HAPPENED? (STATE THE FACTS THAT PROMPTED YOU TO WRITE THIS GRIEVANCE.) I,..., was given a 30 day suspension for allegedly committing sexual harrassment, discrimination, etc, against a female CDOT employee.

WHEN DID THIS HAPPEN? (BE SPECIFIC.) Allegedly over an approx. 2 yr. period....

IF YOU ARE A MEMBER OF LABOR ORGANIZATION, WHAT SPECIFIC ARTICLE(S) AND SECTION(S) OF THE LABOR AGREEMENT DO YOU BELIEVE TO HAVE BEEN VIOLATED? Article 24.01, 24.08, 2.02 and any other law, rule or article that may apply and to be made whole.

WHAT REMEDY ARE YOU REQUESTING? That all disciplinary action be dropped & removed from all personnel files and be made whole.

EMPLOYER'S LEVEL III DECISION:

...the evidence presented during the A-302 hearing on [Grievant] substantiated the charges against him; those charges being sexual harassment and discrimination of a female co-worker. Management stated that there were witnesses that testified at the A-302 hearing that concurred that the grievant did in fact sexually harass and discriminate against the female co-worker. Management further stated that the discipline imposed to grievant was consistent within the District.

The evidence presented indicates that the employer did have just cause in issuing grievant a Thirty (30) day suspension. Management gave information as to other co-workers that testified at the A-302 hearing which clearly showed that the grievant's behavior towards the female co-worker was sexual harassment and discriminatory. Being that the employer action was consistent with the department's Directive (A-301), and that the employer did have just cause, this grievance is denied in its entirety.

STIPULATIONS AT ARBITRATION

1. Delbert Matheny, Grievant, was hired by the Ohio Department of Transportation, District Ten, on May 30, 1978.
2. At the time of the incident, Grievant was classified as an Equipment Operation I, assigned to the Athens County Garage.
3. The Grievant was suspended without pay for thirty (30) days, from December 22, 1986 to January 30, 1987.
4. This grievance is properly before the Arbitrator.
5. Many but not all Athens Garage employees commonly use "Shop talk" profanity and obscenity in conversation and when referring to persons at work.

POSITIONS OF THE PARTIES**EMPLOYER'S POSITION**

...the Grievant was suspended for..repeated acts of harassment against T___, a female co-worker in the Athens County O.D.O.T. garage.

...the Grievant committed certain actions, all of which constituted acts of discrimination and harassment and all of which served to make T___ miserable and uncomfortable.

Soon after the beginning of her employment, T___ noticed that Grievant...showed a special interest in her. At first she thought he was just trying to be a "buddy", but then his interest turned sexual. The boldness of his actions increased and the Grievant openly propositioned ___.

Upon T___'s 'rejection of the Grievant's advances, his behavior turned from propositioning to open hostility and name calling.

The references toward T___ were crass, offensive and such that no person should have to experience.

These unplesant experiences continued and magnified until they culminated in an incident in which the Grievant attempted to "stare down" T___ while approaching her...the Grievant continued toward her in a menancing manner until he finally physically ran into her.

These on-going instances of harassment, when taken with other incidents such as the occasion when the Grievant jabbed a flagpole at T___'s crotch making physical contact with her, were the basis for...suspending [Grievant]....

...a thirty day suspension is a very heavy penalty...but...it was necessary due to the seriousness and repeated nature of these offenses.

UNION POSITION

There was no just cause to discipline Grievant.

Grievant denies T___'s allegations. Some of the facts alleged are untrue. Other are common in the work place. Some of the facts on which the discipline is based allegedly occurred early in T___'s employment but she did not report them to anyone until considerably later, making it difficult for Grievant to disprove the charges.

The investigation was not fair and even handed. It only began after T___ filed a civil suit against the State of Ohio, Grievant and the Union.

The discipline is double jeopardy in that it was issued after Grievant had received a warning. Furthermore the discipline is punitive rather than corrective because in July 1986 months before the suspension was issued. Grievant was enjoined from harassing T.

T__ is not credible.

The Union doesn't deny the presence of hostility between T__ and Grievant but that hostility was work related and stemmed from disputes about Union affairs and politics. The hostility was not sexually based.

STIPULATED ISSUE

Was the discipline imposed upon the Grievant for just cause? If not, what shall the remedy be?

RELEVANT LABOR AGREEMENT PROVISIONS

ARTICLE 24 - DISCIPLINE

24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action....

RELEVANT PROVISIONS OF DIRECTIVE A-301

OHIO DEPARTMENT OF TRANSPORTATION

DISCIPLINARY GUIDELINES

VIOLATIONS	OCCURRENCES WITHIN 24 MONTH PERIOD			
	1st	2nd	3rd	4th
3. Using obscene, abusing, or insulting language, towards another employee; a supervisor, the general public.	Written Reprimand/ Suspension	Suspension	Removal	
5. Intentional acts of discrimination or insult on the basis of race, color, sex, age, religion, national origin, sexual orientation or handicap.	Written Reprimand/ Suspension	Suspension Removal	Removal	
30. Involvement in "horseplay" on CDOT time or property.	Verbal/ Written	Written/ Suspension	Suspension	Removal

RELEVANT PROVISIONS OF ODOT'S EMPLOYEE HANDBOOK**Equal Employment Opportunity**

ODOT is an Equal Opportunity Employer. All employment practices, including, but limited to, hires, promotions, transfers, separations, layoffs and training,...are administered equally without regard to race, color, religion, sex (including sexual harassment), national origin, handicap or age (40-70 years).

The department has developed and is implementing an Affirmative Action Plan (AAP) that outlines the goals for the EEO program, including the development of a recruitment program and an extensive overall monitoring system. The Office of Human Resources Development, with the concurrence of the ODOT director, is the sole authority for the implementation of the Affirmative Action program....

If you believe that you have been discriminated against on the basis of race, color, religion, sex (including sexual harassment), national origin, handicap or age (40-70 years), you may file a complaint internally with the Office of Human Resources Development or externally with the State EEO Office, the Ohio Civil Rights Commission and/or the Equal Employment Opportunity Commission.

ANALYSIS**FINDINGS OF FACT****Introduction**

The Arbitration hearing required two days during which testimony was offered from 12 witnesses and statements from other persons. Some persons originally expected to be called did not testify to avoid needless repetition; the Parties stipulated that the other witnesses would have made the same answers to questions as had been made by the persons who were examined.

General

Ohio's Department of Transportation (ODOT) is divided into a number of districts each encompassing several counties. The entire department is managed by the Director and a cadre of Deputy Directors, one for each District.

District 10, headed by Deputy Director Duggan is headquartered in Marietta. Within the district there are several layers of command between the deputy director and the superintendents, each of whom supervises a garage in one of the counties in the district.

Events in this case occurred in the Athens County Garage of District 10 in 1985 and 1986. At the time Max Adkins was Superintendent. With his Assistant Superintendent and several foreman, Max supervised a workforce of over 30 employees. Most employees were classified as Highway Workers, Equipment Operators, and Rest Area Caretakers. There were also a few office workers including a Time Keeper.

In addition to space for vehicles and other equipment the Athens Garage has offices for staff and an assignment room.

Highway workers and Equipment Operators report to the assignment room at the beginning of each work day for assignment, usually in crews to different projects. The crews travel by vehicle to their assignment. During the day employees on every crew have a lunch break. Toward the end of the work day the employees return to the garage from whence they return home.

Prior to 1985 women had not been employed on a regular basis on highway crews in District 10.

In 1983 a Democrat was elected governor after a series of Republicans. The new governor appointed Warren Smith to be Director of ODOT. Early on Mr. Smith promulgated anti-discrimination policies which conformed to Title VII of the 1964 Civil rights Act. He also developed an affirmative action program

and a policy prohibiting "Sexual Harassment" which he distributed to all employees. The department "Employee Handbook" described ODOT's program to achieve equal employment opportunity and prohibit discrimination. Finally, ODOT's disciplinary rules, made known to all employees, prohibited "intentional acts of discrimination or insult on the basis of...sex" In sum, ODOT took extensive steps to notify all employees that discrimination based on sex and sexual harassment were prohibited by the State.

Detailed Facts

Pursuant to its affirmative action program, ODOT started to hire women for highway work. In February 1985, T___ was the first woman hired for such work on a regular basis in the Athens Garage of District 10.

When she was hired, T___ was about 25 years of age. Her last prior job had been as "Field Director" for the "Ohio Public Workers United", a Union. Prior to that time she had worked a few months as a bus driver, about 5 months as a mall hostess and about a year as an inspector at a glass factory.

T___ had been and continued to be active in affairs of the Democratic Party. She believed that her employment by ODOT had resulted from her interest and activities in support of the Democratic Party. Apparently she also believed then and for some time thereafter that political affiliations determined which employees in ODOT would be promoted, awarded overtime, etc.

Before Grievant began Superintendent Adkins told the highway employees at a meeting that the first woman was coming to work with them on road crews so the men should be "careful" of their language and behavior. Initially the men were careful with T___ just as they have been with Donna Ahle, the second woman employee. However, early on in her career at the Athens garage, T___ made clear by her conversation, conduct and express statements that she was "a big girl" who knew and used profane words, and appreciated "dirty jokes" and

open discussion about sex, etc. The evidence is clear that in respect to conversations, swearing, etc. T___ wanted to be treated and accepted as "one of the boys" and conducted herself accordingly.

T___ was hired for the job of Highway Worker I. The major duties of that job are to perform "flagging" at road projects and general maintenance around the garage (sweeping, shoveling, trash removal), and to pick up litter on the highway.

In the spring and summer of 1985 T___ was generally assigned to "flag" traffic or clean up, sometimes on the same crew as Grievant. Because he was an Equipment Operator she didn't work with him during the day but sometimes she traveled between job site and garage in the same vehicle with him. In addition she sometimes sat in a truck cab with him during the lunch break. Other times they were both present in a group eating together. Occasionally T___ and Grievant discussed sex practices and preferences in the presence of other Employees. What they discussed in private is not clear.

On one occasion T___ sat on the ground leaning backwards on her hands in the presence of Grievant and at least one other person. Grievant walked up to her and lightly touched her abdomen and then her thighs with a flag pole or stick. She pushed the object away and got up without comment. She did not report the incident to anyone.

T___ often communicated with her co-workers about two other topics. One of them was politics. Most of the highway crew had been hired years earlier during the Republican administration. She encouraged them to become Democrats saying that future promotions would go to Democrats and that Republican supporters had less job security. Some of the men resented her remarks and complained to Max. Several times Max told her that she should leave politics "at the gate" because it caused trouble.

T___ also had opinions about Union matters. In 1985 ODOT recognized and had agreements with the Communication Workers of America (CWA), and with the Ohio Civil Service Employees Association (OCSEA). Those and other Unions sought to be certified as the exclusive bargaining representative for employees of ODOT. Both CWA and OCSEA engaged in an active membership drive in 1985.

Within a few months after her hire, T___ was appointed a steward for CWA. Then in August 1985 she requested and was given the first of two unpaid leaves of absence that year to work for the CWA. She worked for several months in connection with organizing ODOT. During the leaves she often came to the garage in connection with solicitation of members.

Some of the garage employees, including Grievant, developed a resentment against T___ in connection with Unionism because although only a new employee she already was a steward and organizer; some employees felt she did not merit those positions, given her lack of experience and familiarity with the work and with ODOT.

While T___ was on Union leave a prankster attached her picture to a garage bulletin board as part of an obscene, abusive and insulting cartoon. She was upset.

During the Union drive that autumn of 1985 some employees, including Grievant, changed their membership from OCSEA to CWA. However Grievant and others soon switched back to OCSEA; T___ was not pleased by the reversal.

Ultimately OCSEA was certified as the exclusive bargaining unit.

In November 1985 T___ returned to the garage from her leave. She was promoted to Highway Worker II. That job involves general highway maintenance duties and snow and ice control, including operation of snow plows. However, Grievant was not usually assigned to such duties. She generally worked in the office as a clerk.

Before T___ returned to work she and Grievant had ceased talking directly to each other. After she returned there was little occasion for them to converse because she worked in the office. She hadn't requested the assignment but Max so assigned her because he needed someone to do clerical work which some employees considered preferable to outside work during the winter, and he believed that her relations with the men had degenerated because of comments in the discussions about politics and union matters. According to Max, T___ told him she liked the assignment in the office.

Early in January 1986 T___ contacted Deputy Director Duggan and then Director Smith protesting alleged discrimination in job assignments and overtime assignments in District 10. Her protests were against supervision, not against any employee. As a matter of fact T___ never complained to anyone about employee conduct generally or about any specific employee until June 23, 1986. The only employee complaint involving T___ and Grievant had been made by the latter, to Max in the fall of 1985. When Max told T___ about Grievant's complaint she replied that Grievant's "only problem is he can't get into my pants." She did not explain the statement or complain about Grievant.

During the early part of 1986 T___ sought other jobs in ODOT. She made several calls to Mr. Smith's office.

In March 1986 the Marietta unit posted an Engineering Aid vacancy at Step I paying \$6.00 per hour. After the posting period closed T___ requested assignment to the Engineering Aide job even though it involved a work transfer and required that she take several months schooling. The Department granted her request on condition that her pay would be changed from \$6.99 to \$6.87 per hour. After the job change she continued to report every morning to the Athens Garage; from there she traveled to Marietta for the training. At the end of the day she was driven back to the Athens garage.

While at work one day in May 1986, T___ left her automobile in the parking area outside the garage. Later she discovered that someone had attached a sticker to her car bumper endorsing the Republican candidate for governor. There may have been other mischief, or vandalism to the car. She complained to the State Police. Police Investigators came to the garage where they interviewed Grievant and several others whom someone had suggested might have committed the vandalism. Apparently the investigation ended without any action. However Grievant, and others resented being interrogated. In any event the State did not rely on vandalism to T___'s car to support discipline of Grievant.

Although Grievant and T___ did not talk directly, they did refer to each other in their conversations with other people. Those references continued to involve some of the same terms used earlier such as "bitch", "son of a bitch", etc., but observers understood that T___ and Grievant were no longer friends. Grievant and T___ adopted additional names to refer to each other. For example, Grievant called her "T.B.", (the initials of her first and last name), "Tuna Butt" and "Tuna Puss". She knew that he used these terms in reference to her when she was not present and resented it. She reciprocated by calling him "Pagan Preacher" and other names behind his back. Each asked other employees what the other was saying.

On June 23, 1986 T___ and Grievant reported at 7:30 A.M. At about 8:30 A.M. Grievant walked through the garage to get his truck. The most direct passage was between a pickup truck and a truck parked about two and a half to three feet behind it. Grievant stood at the back of the pickup truck talking with another employee. Two other employees were alongside the truck within eight feet. T___ and the second employee were each leaning against the pickup's tailgate with both their arms folded when T___ saw Grievant approach. Keeping her eyes on Grievant she shifted her body sideways, balancing on her

right foot with her left arm extended almost straight to and against the tailgate. She also put her right hand in her pocket. Her right arm protruded farthest into the open space with the arm and elbow effectively reducing the passage space probably to less than one foot. The position change caused her to face toward Grievant's line of approach.

Grievant continued walking directly toward the opening between the two trucks in which T___ and the other employee stood. T___ kept watching him walk. Both Grievant and T___ knew or should have known that if he continued walking in the same fashion and if she kept the same position their bodies would make contact. She remained motionless and he continued, passing the other employee without incident but making physical contact with her. He did not stop walking.

They both admit a contact but disagree on the amount. He claims that only the hairs on his arms touched her. She says that he "bumped" her off balance momentarily although she remained standing without touching either truck. To the other three employees she immediately said, "Did you see that son-of-a-bitch hit me?" None of the other three had seen the contact.

At Marietta that day T___ continued to think about the incident and other matters. She became quite angry. When she returned at 4:00 P.M. she went into the office complaining loudly about Grievant. (She testified that she was not talking to anyone in particular but she wanted everyone present, including Max and a Labor Foreman, to hear.) Max asked what her problem was. She asked him to tell Grievant "to stay away from me" or "not to touch me again." Max said he would. The next morning Max called Grievant into the office and told him that she had complained. Grievant denied doing anything to her. Max said "Stay out of her way." Grievant became angry and went outside the garage where he told one of the employees that the "slut" was complaining about him.

On July 9, 1986 T___ filed a complaint with the office of Human Resource Development alleging sex discrimination and sexual harassment. Thereafter she also filed legal action against Grievant, the State of Ohio and the Ohio Civil Service Employees Association. T___ also complained to a group promoting women's rights and to the Governor's wife, an active supporter of women's rights. In September 1986 T___ filed a complaint with the Ohio Civil Rights Commission alleging sex discrimination.

None of the aforementioned complaints are before this Arbitrator nor does the Arbitrator have knowledge of all the proof in those actions. However the Parties did jointly stipulate 13 signed statements given to investigators of Human Resource Development by employees. Most of those persons were examined and cross-examined in arbitration.

On September 8, 1986 T___'s attorney wrote the director of ODOT concerning the department's investigations of T___'s allegations of sex discrimination and sexual harassment. Her counsel expressed her desire "to be protected from working with [Grievant] her primary harasser."

On September 13, 1986 T___ was granted disability benefits at her request. Since that time she has not performed work for ODOT.

At arbitration T___ testified, as she had reported earlier to the Employer, that an employee had told her that Grievant had said if he got into any trouble because of her complaints he would shoot her. At arbitration the employee to whom she attributed the threat report denied making that statement. As a matter of fact he said that at the time in question he was having psychological problems, as was known among the workforce, and engaged in strange acts and statements which he has since tried to forget.

On November 21, 1986 Director Smith suspended Grievant 30 days for allegedly violating Rule 5 of Directive A-301 Disciplinary guidelines. The action was based on findings of fact by the Human Resources Development

Department that: [Grievant] has sexually harassed the complainant by:

- (a) Poking at the Charging Party's crotch with a stick on more than one occasion.
- (b) Picking her up from behind under her armpits on more than one occasion.
- (c) Referring to her constantly as a bitch, slut and tuna puss or tuna butt.
- (d) Deliverately bumping into her in the Athens County Garage when he had sufficient room to maneuver around her.

There are two other allegations about which T___ and Grievant disagree. First, T___ claims that during the summer of 1985 Grievant propositioned her to have sex with him on almost a daily basis for months despite her consistent refusals. She also says that he frequently made comments with sexual innuendoes. Grievant admits engaging in conversations with her in which they both mentioned and alluded to sexual matters but denies ever requesting sex.

T___ made the claim about daily propositions a year after they allegedly occurred. The Arbitrator is not persuaded to accept this allegation in support of discipline for several reasons. First, Grievant denied the accusation. Second, T___ admittedly is very hostile to Grievant. Third, Grievant did not have the opportunity to make daily propositions because he did not have daily opportunities to see her alone; overtures could only have been made in the presence of others. Fourth all the witnesses denied ever hearing Grievant proposition T___.

Second, T___ claims that Grievant picked her up from behind under her armpits on more than one occasion. There is no clear, convincing evidence to support this claim.

CONCLUSIONS OF FACT

1. In the Spring and Summer of 1985 Grievant used profane and obscene "shop talk" appellations toward T___, who replied in kind. The terms were used in apparent friendship without disapproval by either person.
 2. Their relationship degenerated. The extent, if any, to which sexual communications contributed to the worsening relationship between T___ and Grievant is not shown clearly. It is clear that their differing views about union affiliations and politics, and T___'s Union activities, were significant contributing factors.
 3. In his conversations with others about T___ after their "falling out", Grievant referred to her in the same profane terms he had used when they were "friends" and also by other terms, intending insult, which she resented but did not protest to Grievant or to anyone in supervision until months later. Meantime she reciprocated in kind and the cold war between them continued.
 4. There is no clear and convincing evidence that Grievant propositioned T___ on a daily basis as she claimed, or even once. In respect to the claim that Grievant threatened bodily harm to T___ there is no direct evidence whatsoever and Grievant denies making such a threat. Furthermore neither sexual propositioning nor physical threat was one of the four factual bases of the suspension.
 5. Without permission Grievant touched a stick at least once in the general area of T___'s "crotch", specifically her abdomen and upper thighs.
 6. On June 23, 1986 Grievant made an unpermitted physical contact with T___.
- Both Grievant and T___ handled their bodies in ways that created a potential for collision. Either could have avoided the contact but they played "chicken"; when neither "flinched," a touching occurred.

The amount of contact was probably more than touching by the "hairs" on Grievant's arm. More likely it was as reported by T___; even that amount of contact did not cause injury other than to her pride. The contact was so slight it could have easily been overlooked, but for the poor relationship between the two workers.

EVALUATION

The State issued the 30 day suspension as the maximum penalty short of discharge on the basis of four findings of fact which allegedly constituted sexual harassment in violation of Rule 5:

State Finding (a) - "Poking at the charging Parties crotch with a stick on more than one occasion."

The state has not satisfied its burden of proving that charge. It has only shown part of the charge, viz. one touching, not a jabbing, with a stick in a private area covered by work pants.

State Finding (b) - "Picking her up from behind under her armpits on more than one occasion".

This has not been shown clearly and convincingly.

State Finding (c) - "Referring to her constantly as a bitch, slut and tuna puss or tuna butt."

According to the evidence, Grievant did "constantly" refer to her as a "bitch" and "tuna puss" or "tuna butt".

Also, when Grievant became angry after Adkins related T...'s complaint, Grievant referred to her once as a complaining "slut". Usually that term has a sexual orientation, just as does "son-of-a-bitch" and "prick" which T___ called him.

Although the names Grievant and T___ used were intended to insult, their use was not actually on the basis of sex, in view of the relationship between them. Rather, under the circumstances in this case, the obscene, insulting language they used is more properly considered under rule 3.

State Finding (d) - "Deliberately bumping into her...when he had sufficient room to maneuver around her."

The evidence shows Grievant deliberately walked into a part of T___'s body after she had positioned herself to prevent "sufficient room to maneuver around her." The facts were not as relied upon by Director Smith.

Of the four findings of fact relied on by Director Smith only one was as reported to him. Two others were partly accurate and the fourth was not shown.

The evidence shows clearly and convincingly that Grievant violated three rules in Directive A-301.

1. Sex harassment

Using a stick Grievant touched T___'s body in a private area intentionally. That act must be recognized as an "intentional...insult on the basis of...sex". Accordingly it was a violation of Rule 5, A-301.

Grievant says he doesn't recall the frontal touching although he may have administered her a "goose", a practice engaged in by some garage employees. Grievant saw a distinction between touching T___ in front and from the back. A message must be made to Grievant (and perhaps to other employees) who labor under the misimpression that "goosing" is blameless or at most "horseplay," and thus subject only to Rule 30, but not to 5. There is no real difference in respect to Rule 5 between "goosing" a person from behind and touching them in the crotch area from the front. Either, when done intentionally, is a violation of Rule 5. Furthermore it doesn't matter that persons of the same sex are involved in the goosing. It is an invasion of physical privacy which

constitutes sexual harassment prohibited by Rule 5.

2. Obscene, Abusing Language

Grievant often referred to T___ by obscene names and language. Before the fall of 1985 no insult was intended. After that time the names were intended as an insult, and satisfies the definition of harassment. However in this case the insults were not shown to be based on sex. Thus it was not a violation of Rule 5.

Such obscenity and insult could constitute a violation of Rule 3 but discipline cannot be imposed in these circumstances. Garage supervision knew or should have known that a number of employees used obscene, abusive, insulting language but the rule was not enforced. By its neglect supervision temporarily waived the rule and is estopped from punishing retroactively on a selective basis. Before the rule may be enforced all Employees must receive prior warning.

3. "Horseplay."

The bumping incident on June 23, 1986 was horseplay, in violation of Rule 30.

THE DEGREE OF DISCIPLINE

For the reasons discussed, there was just cause for discipline.

Both sex harassment under Rule 5 and Horseplay under Rule 30 are subject to progressive discipline. The violations were committed by a long term employee who had no disciplinary record whatsoever.

The State should have leeway to decide whether the progressive discipline in this situation should begin with a suspension rather than a reprimand. Director Smith acknowledged that he issued the 30 day suspension because he wanted to issue what he considered the strongest discipline short of discharge.

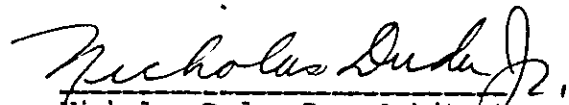
for the four kinds of misconduct found by State Investigators. As shown above, the evidence does not justify those findings. Thus the 30 day suspension under the circumstances of this case is excessive, unreasonable, and not a fair application of the principle of progressive discipline which applies to Rule 5. Accordingly the Arbitrator finds there was not just cause for a 30 day suspension. However a lesser but still significant suspension would have had corrective impact and made a statement about ODOT's firm prohibition of sexual harassment.

The State relied on a decision in a prior arbitration to justify the serious 30 day punishment (in re University of Missouri Health Sciences Center, February 16, 1982). That case is not at all similar and can be distinguished in a number of respects. In the first place the discrimination and harassment there was by a Supervisor. Furthermore the harassment was shown by convincing evidence to have involved not one but several female employees and on a number of different occasions and the misconduct went far beyond the kind of touching in this case. The incidents in those cases were so serious that the victims had complained to their spouses and to their Union. According to T___ she never complained to her spouse until the bumping incident in June, 1986. Furthermore she had never complained about any alleged sexual harassment to the Union or to Supervision before that time. Much earlier T___ had shown she knew how to press her rights.

In respect to progressive discipline for the horseplay, T___ shared responsibility and contributed to the bumping although possibly not in the same degree. Damage was minimal and no punishment was given to her. Under these circumstances at most Grievant should be warned, the prescribed penalty for the first occurrence of a horseplay violation.

AWARD

The grievance is sustained. ODOT is directed to adjust Grievant's Personnel Record to convert the 30 day suspension to a 5 day suspension ending December 26, 1986. Furthermore, the State is ordered to make Grievant whole for wages and benefits lost. Finally, the State is directed to show that Grievant received a warning for Horseplay on June 23, 1986.


Nicholas Duda, Jr., Arbitrator