

#1356

IN THE MATTER OF ARBITRATION

BETWEEN

DISTRICT 1199/SEIU, AFL-CIO

AND

THE STATE OF OHIO/ODHS

Before: Robert G. Stein
Direct Appointment
Case # 16-00-980407-0010-02-12

Principal Advocate for the UNION:

Harry W. Proctor, Administrative Organizer
DISTRICT 1199/SEIU, AFL-CIO
475 E. Mound Street
Columbus OH 43215

Principal Advocate for the EMPLOYER:

Didi Anekwe
Labor Relations Coordinator
OHIO DEPARTMENT OF HUMAN SERVICES
State Office Tower
30 East Broad Street
Columbus OH 43266-0423

INTRODUCTION

A hearing on the above referenced matter was held on January 29, 1999, in Columbus, Ohio. The parties stipulated to the fact that the issue was properly before the Arbitrator. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions. The parties submitted closing arguments in lieu of filing briefs. The hearing was closed on January 29, 1999. The parties agreed the Arbitrator's decision is to be issued in 40 working days.

ISSUE

The parties agreed upon the following definition of the issue:

Was the Grievant, Dennis McGee, disciplined for just cause? If not, what should the remedy be?

RELEVANT CONTRACT LANGUAGE/

ARTICLE 8 DISCIPLINE

Article 5 and 8 *(See Agreement for specific language
(Joint Exhibit 1)*

BACKGROUND

The Grievant in this matter is Dennis McGee. Mr. McGee is a long-term employee who works for the Ohio Department of Human Services in Columbus, Ohio. On March 24, 1998 the Department of Human Services (hereinafter referred to as "Employer") suspended Mr. McGee for three (3) days for violation of ODHS Policy Directive # 17-Acts of discrimination (Sexual Harassment). A violation of Directive # 17 calls for a discipline that can range from a written reprimand to removal. Mr. McGee had never received a discipline during his working career with the Employer.

The Employer determined that Mr. McGee had sexually harassed a cleaning employee, Ms. Alice Hill, who worked on Mr. McGee's floor (4th floor) in the LeVeque Tower. Ms. Hill is not an employee of the State of Ohio, but is an employee of a cleaning firm, LeVeque Tower Building Authority, who contracts with the State of Ohio to clean the LeVeque Office Tower.

The Employer stated that Mr. McGee created a "hostile working environment" as defined by Department Policy Directive # 17. There were two different incidents

involved in this case. The first incident occurred on January 23, 1998, involving Mr. McGee allegedly making bodily movements of a gyrating nature at the entrance to the Men's restroom as Ms. Hill was attempting to enter it to do her cleaning.

Ms. Hill had been checking all the restrooms from the 18th floor of the LeVeque Tower and was checking the 4th floor Men's restroom when she ran into Mr. McGee coming on the other side of the entrance door. According to Ms. Hill, Mr. McGee *"stopped directly in front of me...began to gyrate his hips and kept saying Ooo, Ooo, Ooo."* Ms. Hill stated that Mr. McGee was blocking her entrance to the restroom. Ms. Hill told him she had just checked all the restrooms from the eighteenth floor down and that she was tired. Ms. Hill stated that Mr. McGee then said, *"Oh, the eighteenth make you tired like that"* and then he *"started gyrating and shaking his hips again"* (JX 3D). Ms. Hill then continued past him and did her work. McGee left and went back to his work area. Ms. Hill complained to her supervisor

The second incident with Mr. McGee and Ms. Hill occurred four days later on January 27, 1998. As Ms. Hill was leaving the women's restroom on the fourth floor of the LeVeque Tower she found Mr. McGee standing over her cleaning cart which was in front of office suite 400. Ms. Hill stated that she did not know what to say because she *"...didn't know if he had been talked to since the last incident."* Ms. Hill stated, *"I asked him what he was doing" and he said "I am doing, I am doing."* Ms. Hill then said Mr. McGee walked up to her and shook his hips saying, *"I would like to make you do too."* Ms. Hill stated Mr. McGee kept repeating this phrase as she walked away from him (JX 3E). Ms. Hill reported this incident to her supervisor and filed a sexual harassment complaint with the EEO Manager, Gerrit J. Rietveld. Ms. Hill had a security escort for

for approximately one month whenever she cleaned on the fourth floor as a result of these incidents with Mr. McGee.

The Employer conducted an investigation and gathered a statement from Ms. Cynthia Curry, Supervisor of Security for the LeVeque Tower Office Building. Ms. Curry stated,

"Dennis McGee has approached me within the last month or two and made statements that I view as of a sexual nature including remarks about how he could come over to my house and keep me warm. I have also heard him make similar offensive remarks to other women in the second floor deli. He has a habit of looking at women, including myself, that makes you feel he is looking through you. Some of the women laugh at him and some give him dirty looks. In the Case of Alice Hill...she told me that she is offended by his behavior and that she is afraid to be in an area which he may frequent" (JX 3G).

Mr. McGee made a provided a statement during the investigation and said in pertinent part:

"The problem with this matter is that I have joked with this women in basically the same manner for over two years and have never been told that this was undesirable behavior. In fact, we both usually just laugh and go on our separate ways. ...The only time she mentioned to me that she didn't appreciate my behavior was a few weeks ago, and since that time I haven't said a word to her. ...I kid and joke with most of the women who know me well and none take any offense (the same way Alice has previously reacted) (JX 3H).

On February 12, 1998, Mr. McGee was told by his supervisor, Ginny Williams, not to have any contact with Alice Hill. Ms. Hill stated that on February 23, 1998 she was getting off the elevator on the second floor and ran into Mr. McGee. She stated,

Mr. McGee was standing in the hallway under the art work...He stared at me and made a POW! noise at me, like a gun. I was frightened by his remark and went into the women's restroom to avoid further contact with him."

EMPLOYER'S POSITION

The Employer's position in this case is clear and concise. The Grievant, Dennis McGee, clearly violated that Department's sexual harassment policy (Directive # 17) and admitted to confronting Ms. Hill as she described in her statements. The Employer stated it exercised its rights in giving Mr. McGee a three (3) day suspension and that this level of discipline was commensurate with the offense. The Employer also pointed out that Mr. McGee was verbally counseled about his flirtatious behavior in 1994.

Based upon the above, the Employer request that the Arbitrator uphold the Grievant's suspension and his grievance should be denied.

UNION'S POSITION

The Union does not dispute the essential facts in this case. The Union and the Grievant acknowledge that Mr. McGee said and did the things Ms. Hill claims happened on January 23rd and January 27th. However, the Grievant does not agree with Ms. Hill's description of his encounter with her on February 23, 1998. The Grievant denies staring at Ms. Hill and making her uncomfortable.

The Union argues that Mr. McGee was disciplined arbitrarily and not progressively. Mr. McGee has no discipline on his record and in the instant matter he was never warned to avoid Ms. Hill prior to January 27, 1998, contends the Union. Ms. Hill never informed Mr. McGee that she was offended by his behavior prior to the dates

of the January incidents. A suspension in this case is punitive discipline and is not progressive, asserts the Union. The Union argues that Mr. McGee was merely joking around like he does with many of the women in the Department. The Grievant never made physical contact with Ms. Hill and never displayed extreme offensive behavior, argues the Union.

Based upon the above, the Union urges the Arbitrator to sustain the grievance and to make the Grievant whole in every way including the restoration of all lost wages and benefits.

DISCUSSION

The facts regarding what the Grievant said and how he acted toward Ms. Hill on January 23 and 27, 1998 are straightforward and in the main are not disputed by the Grievant. This is a case that involves intent and impact. Mr. McGee argues that he never intended to sexually harass Ms. Hill and felt his behavior could be characterized as "joking." Ms. Hill and the Employer see Mr. McGee's behavior quite differently. Ms. Hill was a credible witness and was convincingly upset by the Grievant's behavior on January 23, 27 and February 23, 1998. She was upset to the extent that she sought the protection of security in order to do her job without fear.

Was Ms. Hill overreacting or oversensitive on those days and did not see that Mr. McGee was simply kidding around? And if she has had a past problem with Mr. McGee, why did she not seek supervisory assistance earlier? Ms. Hill and witness Currie imply that Mr. McGee has displayed a pattern of making inappropriate sexually oriented remarks toward a variety of woman in the workplace prior to the incidents that comprise

the instant matter. But the Employer offered no proof of this behavior or any serious past effort to curb it. Mr. McGee has a clean work record and has a great deal of seniority with the Department.

Sexual harassment is more about power than it is about sex. It is about the power of one human being forcing him or herself on another. It is also about respect and one human being disrespecting another. The facts in this matter, although they only represent two incidents (that were 4 days apart) met the definition of sexual harassment. Only Ms. Hill is able to judge how she felt about the Grievant's abuse of power and his suggestive behavior. The general test of sexual harassment is whether the behavior or actions are offensive to the victim (Ralph's Grocery Co., 100 LA 63, 1992). A man who approaches a female and makes comments and gestures must evaluate how **a woman would reasonably feel** about such conduct and not how a male feels she should take them (100 LA 866, 1992).

Overt speech, behavior, or dress on the part of the victim that signals a welcome to sexual gestures or innuendoes will act to nullify the impropriety of an employee's conduct. In the instant matter, I found no evidence to suggest that what Mr. McGee did was welcomed by Ms. Hill. Mr. McGee testified that he and Ms. Hill have joked around for years. This statement was not supported by any other witness and is not given much weight in light of the factual circumstances and corroborative testimony of Ms. Currie. Although the facts indicate Mr. McGee and Ms. Hill had a nonromantic casual work friendship, I did not find this to have any bearing on this case nor did it lead me to believe that Mr. McGee's suggestive behavior was welcomed by Ms. Hill.

Mr. McGee compounded his transgression by harassing an outside employee. I find his behavior embarrassed his Employer and potentially tarnished its reputation. Ms. Hill by the very nature of her “contractual position” has less power than one of the Grievant’s coworkers. Ms. Hill was more vulnerable! It is reasonable to assume that an employee of a contracting company is less likely to “make waves” over her conflict with an employee of the contracting agency.

The law against sexual harassment (of which the Employer and the Union subscribe, Article 6 of the Collective Bargaining Agreement) is based upon an understanding that women who have been sexually harassed suffer great stress and a decrease in psychological well-being (Am. Psychiatric Ass’n Bd. of Trustees, *Statement on Discrimination Based Gender and Sexual Orientation*, 145 Am. J. Psychiatry 1494, 1988). The fact is that employees (and outside employees) are entitled to respect for their person and dignity on the job. They should be able to perform their work free of sexual abuse or harassment.

The Union effectively argued that the Employer overreacted in this matter and punished Mr. McGee too severely. Mr. McGee has had a long trouble free record according to the evidence. This record does not excuse Mr. McGee’s conduct in this case; however, it does provide a context for appropriate punishment. The impact of taking away a day of pay from an employee for the first time in his “blemish free” working career should not be underestimated. Corrective action is supposed to be corrective with the idea of issuing the minimum force to get the desired result. I find the Employer’s actions did not take into consideration Mr. McGee’s long and discipline free tenure of employment.

Although I thoroughly disapprove of Mr. McGee's conduct this does not mean that he is not able to respond to negative consequences that seem more in line with the nature of his offense and his record. Mr. McGee never touched Ms. Hill and did not use harsh or profane language. His gestures were sexually suggestive and were intimidating to Ms. Hill. Ms. Hill was an outside employee and the Employer's reputation could have been affected by Mr. McGee's behavior. However, this was the first time that Ms. Hill (or Mr. McGee's supervisors) told Mr. McGee that his so called "physical and verbal joking around" was offensive to her. Times have changed and some employees (particularly male employees) have been slow to accept the "new order of equity in the workplace."

The Employer had a choice of giving Mr. McGee anything from a written warning to terminating him from employment. I find that the Employer needs two things from Mr. McGee: first, it must get his attention regarding the inappropriateness of his pattern of sexually oriented "joking," (that was clearly a form of sexual harassment on January 23 and 27th). Secondly; the Employer needs to give this long-term employee, who has a clean work record, the opportunity to realign his thinking and behavior with that of contemporary society and the equal place women have in it.

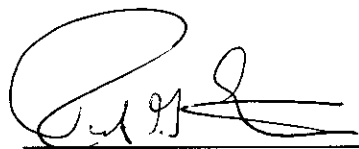
AWARD

The grievance is denied in part and sustained in part.

The Grievant's three (3) day suspension shall remain on his record. However, in light of Mr. McGee's long-standing work record, Mr. McGee can earn back one (1) day of back pay (at the appropriate rate) when the following conditions are met:

1. Within ninety (90) calendar days, the Employer shall schedule and Mr. McGee must attend a training session on sexual harassment. If a training session is not available, the Employer and the Union are free to agree on another educational experience that would substitute for this session.
2. If Mr. McGee complies with the above educational condition and remains free of discipline (for a same or similar offense) for a period of one (1) year from the date of this Award, he shall receive one (1) day of back pay (at the appropriate rate).

Respectfully submitted to the parties this 24th day of March 1999.

A handwritten signature in black ink, appearing to read 'R. G. Stein', written over a horizontal line.

Robert G. Stein, Arbitrator