ROBERT BROOKINS
LABOR ARBITRATOR ◆ PROFESSOR OF LAW ◆ J.D. ◆ PH. D.

#1387

July 30, 1999

Ms. Leslie Jenkins
Arbitrator Scheduler
Division of Human Resources
Office of Collective Bargaining
106 N. High Street, 7th Floor
Columbus, OH 43215-3009

Re: Grievance # 23-13-99014-001-02-11
Grievant: Dr. Stewart Harris

Dear Ms. Jenkins:

Please find the enclosed the Arbitrator's opinion and award in the captioned matter. Thanks for the opportunity to serve you.

Sincerely,

Robert Brookins

Robert Brookins

6518 GREENRIDGE DR., INDIANAPOLIS, IN 46278-2224
OFFICE 317/876-7392 ◆ FAX 317/876-1052

#1387

OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN
The Pauline Warfield Lewis Center
-AND-
District 1199/SEIU

Janice D. Stephens, Adm. Organizer 1199/SEIU
Neni Valentine, Adm. Organizer Dist. #1199
Leroy Maurant, Dentist, 1199 Representative
Stewart M. Harris, Grievant
Rhonda Bell, OCB-LRS
Catherine M. Taylor, Registered Nurse
Michele D. Cook, Registered Nurse
Theresa L. Culbertson, Dietician
Brian Pharris, Housekeeping
Leroy Stenson, Nursing
Susan Buckley, Nursing
Margaret Green, Nursing
Brad Nielsen, EEO Reg. Program Administrator
Johanna Lierer, Human Resource Spec. - Lewis Center
Malleri Johnson-Myricks, LRO Human Resources Central Off.
Georgia M. Brokaw ,Labor Relations Officer
Ronald J. Lawrence, Human Resource Spec.
Carla Sowder, Human Resource Spec. II
Jackie Hines, Nursing
Liz Banks, Chief Executive Officer and Appointing Authority
Gilbert Murphy, EEO Manager for ODMH
Malcolm King, Director of Nursing
Savio Russo, Nurse Supervisor
Cynthia Beck, Registered Nurse
Desiree Caldwell, Registered Nurse
Marianne Russ, Assistant Director of Nursing
Sharon Buttrom, Social Worker
Paul Blackwell, Operations Director
Wendolyn Phillips, Social Worker
Barbara Chyette, Social Worker
Rita Surber, Human Resource Administrator
Rhonda Milton, Human Resource Specialist
Linda Buntoff, Interim Director of Adjunctive Therapies & Forensic Services

GRIEVANCE #
23-13-99014-001-02-11

HEARING HELD
MAY 26, 1999 & MAY 27, 1999

CASE DECIDED
JULY 30, 1999

ARBITRATOR: ROBERT BROOKINS, J.D., PH.D.
SUBJECT: REMOVAL—SEXUAL HARASSMENT & INSUBORDINATION

I. Preliminary Statement

A hearing on this matter was held in the Pauline Warfield Lewis Center in Cincinnati, Ohio before this Arbitrator, whom the parties mutually selected from their permanent panel, pursuant to the procedures of their Collective-Bargaining Agreement. The hearing occurred at 9:00 a.m., on May 26 and 27, 1999. The parties stipulated that the matter was properly before this Arbitrator and presented one issue on the merits as set forth below.

Both parties had a full and fair opportunity to present evidence and arguments in support of their positions in this matter. Specifically, they were permitted to make opening statements, to introduce admissible documentary evidence, to present witnesses who testified under oath, and to cross-examine the opponent's witnesses. Finally, the parties had a full opportunity either to offer closing arguments or to submit post hearing briefs; they chose the latter.

II. The Facts

The Pauline Warfield Lewis Center (PWLC or the Employer) is a mental hospital within the Ohio Department of Mental Health (ODMH) that treats civil and forensic mental patients. Forensic patients usually come to PWLC from the criminal justice system where they were: (1) "police holds" from police departments; (2) adjudged not guilty by reason of insanity; or (3) adjudged incompetent to stand trial. Among other things, the competitive conditions within the mental health industry place a premium on proper employee conduct—observance of policies, rules, and procedures.

PWLC employed Dr. Stewart Harris (the Grievant) as a Forensic Psychiatrist for approximately fifteen years before terminating him on December 29, 1998 for failure of good behavior—sexual harassment— and insubordination—failure to obey provisions of an Administrative Leave Agreement. The Grievant's troubles began during a meeting, on November 2, 1998, which he, Ms. Desiree Caldwell (a Registered Nurse), and Mr. Savio Russo (Supervisor of Nursing) attended. They met to address the Grievant's complaints about Ms. Caldwell's job performance. During the discussion, the Grievant accused

Ms. Caldwell of not respecting him (or his position). In response, Ms. Caldwell noted that respecting the Grievant was difficult, given his sexual and racial statements toward her. Hearing this, Mr. Russo offered to have Mr. Malcolm King (Director of Nursing) join the meeting, but the Grievant said that would not be necessary and left the meeting.

Nevertheless, Mr. Russo continued to pursue the matter with Ms. Caldwell who began sobbing as she offered a detailed account of how the Grievant had allegedly sexually harassed her during the last five months. Furthermore, Ms. Caldwell alleged that the Grievant had sexually harassed other female employees at PWLC. Mr. Russo urged Ms. Caldwell to report this matter to Mr. King. She did.

On or about November 4, 1998, Mr. King and Ms. Marianne Russ (Assistant Director of Nursing) interviewed Ms. Caldwell. After hearing Ms. Caldwell's account of the Grievant's sexually harassing conduct, Mr. King apprised Ms. Elizabeth Banks (Chief Executive Officer) of the situation and advised Ms. Caldwell to contact Mr. Gilbert Murphy, EEO Manager for ODMH.

Ms. Caldwell met with Mr. Murphy and gave him the names of other female employees whom the Grievant had allegedly harassed. Ms. Cynthia Beck (Registered Nurse) was one of those names. During Ms. Beck's interview with Mr. Murphy, she became so distraught that Mr. Murphy asked Ms. Banks to assist in calming Ms. Beck. Sometime between November 4 and November 9, 1998, Ms. Banks asked Mr. Murphy to investigate the Grievant's alleged sexual harassment of PWLC's female employees. That investigation began on or about November 9, 1998. Also, on or about November 12, 1998, Ms. Malleri Johnson-Myricks (Labor Relations Officer, ODMH) launched an administrative investigation of the matter.

On November 9, 1998, Ms. Banks gave the Grievant written notice that he had been placed on administrative leave pending further investigation into the allegations of sexual harassment against him.[1] The Letter of Administrative Leave stated:

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[1] Joint Exhibit 4. Ms. Banks placed the Grievant on administrative leave before seeing the results of Mr. Murphy's investigation.

> You . . . are to remain *available* to be contacted by *my office* between the hours of 8:00 a.m. and 4:30 p.m. Monday through Friday. You are not permitted on the Pauline Warfield Lewis Center grounds, nor should you have contact with any staff, except your Union Delegate, without authorization from the CEO.[2]

Mr. Murphy unsuccessfully sought to telephone the Grievant at home on November 20, 23, 24, 1998 at 3:30 p.m., 12:15 p.m., and 10:05 a.m. respectively.[3]

The Grievant was not only away from home each of those days but also failed to contact Mr. Murphy as requested. On November 20, the Grievant's wife answered the telephone and Mr. Murphy asked that the Grievant return his call. On November 23, Mr. Murphy left a message on the Grievant's answering machine to return his call. Finally, on November 24, Mr. Murphy telephoned the Grievant at home, spoke to his wife, and asked that the Grievant contact him.

On December 4, 1998, Ms. Banks presided over the Grievant's pre-disciplinary hearing and, on December 12, 1998, recommended that he be terminated for violation of PWLC's sexual harassment policy and for insubordination.[4] That same day, Mr. Michael F. Hogan (Director of Mental Health) officially ordered the Grievant's removal,[5] which Ms. Banks implemented on December 28, 1998.[6] The Union grieved this decision on December 29, 1998. Finally, on January, 12, 1999, Ms. Banks reminded the Grievant that he was permitted to enter upon PWLC's campus only under the conditions set forth in his Leave Agreement.

III. Accounts of the Grievant's Sexually Harassing Conduct

Credible testimony as well as interviews of the alleged victims and their statements establish the following accounts of the Grievant's conduct.

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2 Joint Exhibit 4 (emphasis added).

3 Joint Exhibit 5.

4 Employer Exhibit 10.

5 Joint Exhibit 3 at 33.

6 *Id* at 34.

A. Ms. Desiree Caldwell (Nurse Manager)[7]

The Grievant first began sexual harassing Ms. Caldwell on or about July 7, 1998 when she was going through a divorce. She was reading treatment documentation that day when the Grievant asked whether her fingernail and toenail polish (nail polish) matched, mentioned running his fingers through her hair, asked her to wear sandals the next day so he could see her toenail polish and to keep silent about his comments. This experience so upset Ms. Caldwell until the next day she reported to work wearing no fingernail polish and with her hair pulled back. Also, that day she specifically told the Grievant that his behavior had made her uncomfortable and that she expected it to stop. The Grievant apologized and temporarily honored her request.

However, shortly after Ms. Caldwell began wearing fingernail polish again, the Grievant resumed his inquiries and comments about the color coordination of her nail polish. When the strain of Ms. Caldwell's divorce mounted, the Grievant suggested that she come to his office, lie on his couch, and discuss her problems. Ms. Caldwell refused and the Grievant became aloof and "cool" toward her, causing her feel alone and nervous. There were no witnesses to corroborate any of the foregoing encounters between the Grievant and Ms. Caldwell. On the other hand, two employees heard Ms. Caldwell ask the Grievant, "What about the nails?" The Grievant did not respond.

The final clash between the Grievant and Ms. Caldwell occurred when she assigned patient to a new room without first consulting the Grievant and subsequently rejected the Grievant's order to reassign the patient to the original room. This disagreement resulted in the above-mentioned meeting, on November 2, 1998, between the Grievant, Ms. Caldwell, and Mr. Russo. On November 4, 1998, Ms. Caldwell submitted her written statement which closely tracks her testimony in the arbitral hearing before the Arbitrator.[8]

The Grievant's sexual harassment was not the only work-related problem for Ms. Caldwell. She

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[7] Although Ms. Caldwell has recently assumed her maiden name (Diersing), for purposes of this opinion, the Arbitrator will use her married name.

[8] Joint Exhibit 3.

committed approximately five medication errors, four of which were reported by Ms. Catherine M. Taylor and one by Ms. Susan Buckley, both of whom are registered nurses.[9] Mr. King reviewed those reports, classified the medication errors as non-life-threatening (level-one) errors, and factored in the extenuating circumstance of Ms. Caldwell's divorce.[10] Consequently, PWLC decided to counsel, rather than discipline, Ms. Caldwell.

B. Ms. Cynthia Beck (Registered Nurse)

PWLC employed Ms. Beck on May 11, 1998 and she resigned on February 23, 1999. During those nine months, the Grievant made approximately 100 comments and inquiries about Ms. Beck's fingernail and toenail polish. This behavior started approximately one week after Ms. Beck began working with the Grievant on Unit 5. From the beginning, the Grievant's conduct confused, embarrassed, and frightened Ms. Beck, but she somehow convinced herself that the Grievant was merely teasing.

However, the inquiries and comments quickly became incessant. The Grievant would continually inquire about the color coordination of Ms. Beck's nail polish and whether he could view her toenails.

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[9] The table below sets forth Ms. Caldwell's medication errors as well as the dates on which they were committed and reported:

Type of Error	Date Occurred	Date Reported	Reporter
Renewed order of multivitamins that should not have been renewed. Order updated on cardex but not written on chart as verbal order.	October 4, 1998	October 29, 1998	Ms. Taylor
Within four days, a patient missed approximately eight doses of Dimetapp because Ms. Caldwell failed to order the medication.	October 5, 1998	October 5, 1998	Ms. Taylor
Renewed order of Periactin that should not have been renewed. Medicine was given out of order on first shift.	October —, 1998	October 29, 1998	Ms. Taylor
Gave medication when it should have been withheld.	November 7, 1998	November 7, 1998	Ms. Taylor
Gave Retalin when it was not due and failed to notify physician of this error.	September 17, 1998	November 11, 1998	Ms. Buckley

[10] Employer Exhibit 5.

During the third or fourth week of their working relationship, the Grievant began telephoning Ms. Beck on Unit 5 up to five times per day, commenting and inquiring about the color of her nail polish. He once told Ms. Beck that he was attracted to women who "take care of their feet."

Eventually, the Grievant became more aggressive. For example, while he and Ms. Beck were discussing a patient-related problem, the Grievant positioned himself behind Ms. Beck and began rubbing her back and shoulders, causing her to tense up and recoil. Later that same day, while visiting Ms. Beck's unit, the Grievant again asked about her nail polish. On another occasion, the Grievant asked Ms. Beck for her telephone number even though, as a union delegate, he should have had it. Ms. Beck acquiesced out of fear. Once Ms. Beck was upset about how an employee conducted a forensic review. While offering his advice, the Grievant placed his hand on Ms. Beck's hip and slid it over and to the top of her abdomen just beneath her breast. Again, she recoiled at his touch, uncertain whether he sought to comfort her or to serve some other agenda. Apparently sensing her apprehension, the Grievant again cautioned her not to mention his conduct to others. Ms. Beck's response was, "Just call me Monica," as in Monica Lewinsky.

As the Grievant became more aggressive, Ms. Beck found her voice and confronted him. The first example of this occurred when the Grievant telephoned her while she was expecting a call from the physician of a patient whom she was about to discharge and who had threatened his parents. Ms. Beck accepted the Grievant's telephone call thinking it was the patient's physician. When she answered, the Grievant immediately began asking about her toenail polish. Infuriated, Ms. Beck yelled at him to stop tying up the telephone lines and to stop obsessing about her toenail polish. But the Grievant either could not or would not heed her warning.

The pivotal point in their relationship occurred later that same day when the Grievant walked up behind Ms. Beck as she was stooping over a chart rack searching for a patient's medical chart. The Grievant placed his hands on Ms. Beck's hips and either moved closer to her or moved her closer to him. This time, Ms. Beck turned to face the Grievant and asked, "Who the hell do you think you are?" She then warned that

her fiancé would shoot the Grievant if he knew how the Grievant treated her. Unperturbed, the Grievant replied, "why would you tell him?" Why would he have to know?"

After that the Grievant stopped harassing Ms. Beck. In fact, for approximately two weeks, he stopped speaking to her altogether, even when she turned to him for guidance on patient-related matters.

Up to this point several factors combined to prevent Ms. Beck from either informing others about the Grievant's behavior or telling him that his attention was unwelcomed. For example, her confusion about the Grievant's behavior and her respect for physicians in general played a part in her silence. Also, contributing to her silence was the fact that the Grievant had her telephone number and some general idea where she lived. Finally, because the Grievant had repeatedly asked Ms. Beck to remain silent about his conduct, she thought he fully recognized the inappropriateness of his actions toward her. Eventually Ms. Beck and the Grievant developed a working relationship that was untainted by sexual harassment. Nevertheless, on November 1, 1998,[11] Ms. Beck officially reported the sexual harassment but only after Mr. Murphy approached her about it.

After Ms. Beck reported the Grievant's conduct to PWLC, co-worker enmity quickly filled the void left by the Grievant's sexual harassment. Some co-workers and subordinates began scorning and even threatening her for having reported the Grievant's misconduct. For instance, one employee accused Ms. Beck of reporting to work with freshly painted fingernails and then "crying" about the Grievant's attention. Another co-worker advised Ms. Beck to keep her mouth shut, lest she find herself handling threatening patients without co-worker assistance. Also, one employee offered to take Ms. Beck "to God's house."

Co-worker wrath and fear for her safety ultimately triggered Ms. Beck's resignation on November 12, 1998.[12] Although the Grievant's behavior did not directly trigger her resignation, it was a substantial factor in that decision. Moreover, the Grievant's sexual harassment contributed to several physical ailments

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[11] Joint Exhibit 3 at 8-10.

[12] Employer Exhibit 7.

that Ms. Beck suffered while employed at PWLC such as migraine headaches which hampered her ability to do her job. Ms. Beck also found that she was sleeping twelve hours per night and was unable to concentrate. No one witnessed any of the foregoing encounters between the Grievant and Ms. Beck.

C. Ms. Rhonda Milton (Human Resource Specialist)

On October 26, 1998, the Grievant walked into Ms. Rhonda Milton's office, inquired about a newly-hired nurse, and placed his hand on Ms. Milton's shoulders. When she asked him to remove his hands, he rubbed them from side to side across her shoulders. Ms. Milton grabbed a pair of scissors, stabbed at the Grievant as she swung around in her chair, and warned him not to touch her. The Grievant snickered and left her office. Ms. Rita Surber (Ms. Milton's supervisor) witnessed this incident. Later that same week Ms. Milton was carrying a container of soft drinks with both hands when she met the Grievant in the hall. As they passed each other, the Grievant rubbed her arm from her elbow to her hand. She yelled, "I have told you to keep your hands off me." The Grievant laughed and continued walking in the opposite direction. Once when Ms. Milton was wearing opened-toed shoes, the Grievant came up and massaged her toes. She kicked at him with such force that her shoe flew off her foot.

However, the relationship between Ms. Milton and the Grievant was not always so tense. Under cross-examination, she admitted that she and the Grievant bowled in the same league, she often complimented him on his attire and actually obtained some garments that the Grievant had requested for himself.

D. Ms. Sharon Buttrom (Social Worker)

Approximately eight years ago, the Grievant walked into Ms. Buttrom's office, cupped the sides of her face in the palms of his hands, pulled her face towards his face, and tried to kiss her on the lips. Ms. Buttrom responded by "mugging the Grievant," placing her hand across his face as a barrier to frustrate his amorous attempt. Also, Ms. Buttrom noted that Dr. Maurant (the Grievant's union representative) questioned

her about the accuracy of her recollection of this event. Ms. Buttrom says she did not officially report the incident because she stopped dealt with it herself.

E. Ms. Carmen Standifer (Former Dietary Employee)

In 1995, Ms. Standifer first told Mr. Paul Blackwell (Operations Director) that the Grievant would touch her inappropriately as he passed her in a hallway. When Mr. Blackwell approached the Grievant about these allegations, the Grievant simply denied them. Still, Mr. Blackwell warned him to cease and desist. In 1997, Ms. Standifer gave Mr. Blackwell a choice: he could either stop the Grievant from inappropriately touching her or she would stand up in their church and inform the entire congregation about the Grievant's behavior. Mr. Blackwell again admonished the Grievant. This time, instead of denying Ms. Standifer's allegations, the Grievant accused Ms. Standifer of setting the tone for their interactions. Mr. Blackwell waited until February 2, 1999, approximately four years later, to report these incidents.

F. Ms. Wendolyn Phillips (Social Worker)

Sometime between 1991 and 1992, Ms. Phillips served on Unit 5 with the Grievant. According to Ms. Phillips, their relationship was tense because the Grievant did not respect social workers and Ms. Phillips apparently demanded professional respect. During a confrontation between them, the Grievant picked Ms. Phillips up, threw her across his shoulder like a sack of potatoes, and smacked her behind with his hand. Needless to say this conduct humiliated Ms. Phillips who subsequently received permission to transfer off Unit 5 and away from the Grievant. Throughout her professional relationship with the Grievant, Ms. Phillips never engaged in sexual banter or horseplay with him. Finally, Ms. Phillips claimed that she was unaware that the Grievant sought to have her transferred off Unit 5 because of her alleged incompetence.[13]

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[13] Although the record does not show that Ms. Phillips was incompetent, it does reveal that, on February 12, 1998, she was scheduled for a pre-disciplinary conference for neglect of duty after she allegedly arrived twenty-five minutes late to a Bridge Builders' Committee meeting and was unprepared for a meeting with community colleagues.

G. Ms. Barbara Chyette (Social Worker)

Although Ms. Chyette never worked with the Grievant, she interacted with him on union business. Once the Grievant told Ms. Chyette that he had a sexual dream about the two of them. Ms. Chyette asked the Grievant not to make such statements to her. Subsequently, the Grievant commented to Ms. Chyette about her sandals and toenails. Ms. Chyette thought little of the comment, except that the subject matter was rather odd. She did not file a complaint against the Grievant because he respected her request and ceased making such comments to her.

H. Ms. Linda Bunthoff (Interim Director of Adjunctive Therapies and Forensic Services)

On several occasions, during the last eight years, the Grievant has sexually harassed Ms. Bunthoff. He has, for example, attempted to play footsie with her in a conference room and invited her out to lunch. During this eight-year period, Ms. Bunthoff repeatedly told the Grievant that she lacked romantic interest in him. Although each such notification was followed by a lull (up to several months) in the Grievant's amorous quests, he inevitably resumed the harassment. On one occasion, he invited Ms. Bunthoff to his office, had her to sit on his couch, offered a pair of gold Lame slippers, and asked if he could remove her shoes so that she might try on the slippers. She declined the slippers as well as the invitation to have her shoes removed and asked the Grievant to leave her alone. Once the Grievant was so intent on seeing whether Ms. Bunthoff's toenail and fingernail polish matched that he literally pulled her off her chair and onto the floor while attempting to remove her shoe. Fearing that he had injured Ms. Bunthoff, the Grievant quickly apologized and ceased harassing her for several months.

On March 23, 1998, the Grievant telephoned Ms. Bunthoff and left the following message in her PWLC audix: "I don't know why but I just had this tremendous fantasy of your massaging on my body right about now. But you're not interested so I just thought I would share the fantasy with you anyway be good,

bye."[14]

The belief that the Grievant would stop harassing her kept Ms. Bunthoff from filing an official complaint about the message. Nevertheless, she took several steps in response to the message. First, she had PWLC's campus police department listen to the message. Then she copied the message onto her answering machine at home and allowed Ms. Rita Surber to hear it.[15] Ms. Surber listened to the above-mentioned message, transcribed it, and reviewed the transcription for accuracy. Then Ms. Surber and another employee positively identified the Grievant's voice on the message. Even though Ms. Bunthoff found the Grievant to be annoying and bothersome, she did not report him earlier because she felt she could keep him at bay. However, she never enjoyed his attention, repeatedly asked him to stop, and sought to avoid him.

The Grievant received sexual harassment training. In addition to being trained in May 1988, he received training on or about April 26, 1989 at the Rollman Psychiatric Institute.[16] Moreover, in their paycheck envelopes, PWLC employees receive copies of PWLC's sexual harassment policy which among other things defines sexual harassment for PWLC's purposes.[17] The Grievant also received a copy of this policy.[18]

III. Issue

Was the Grievant removed for just cause? If not, what shall the remedy be?

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[14] Employer Exhibit 8.

[15] Employer Exhibit 8.

[16] Employer Exhibit 9.

[17] Joint Exhibit 8 at 3 and Joint Exhibit 9at 22. Ms. Surber witnessed the Grievant signing Joint Exhibit 9. *See also* Joint Exhibit 6 which is another statement of PWLC's sexual harassment policy which defines sexual harassment. Although the record does not show that the Grievant received a copy of this particular sexual harassment policy, the definition of sexual harassment in this policy is the same as that stated in policies for which the Grievant signed.

[18] Joint Exhibit 10.

IV. Relevant Contractual Provisions and Work Rules

Article 8.01

Disciplinary action may be imposed on an employee only for just cause.

Article 8.02

The principles of progressive discipline shall be followed. These principles usually include:

A. Verbal Reprimand
B. Written Reprimand
C. A fine in an amount not to exceed five (5) days pay
D. Suspension
E. Removal

The application of these steps is contingent upon the type and occurrence of various disciplinary offenses.

Ohio First Team
Employee Orientation Packet

The state of Ohio defines sexual harassment as any unwelcome or unwanted sexual advance for sexual favors, or other verbal or physical conduct of a sexual nature from someone in the work place that creates discomfort and or interferes with the job. Conduct constitutes sexual harassment when:

* * * *

such conduct has the purpose or effect of interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.[19]

Sexual harassment is any unwanted attention of a sexual nature from someone in the workplace that creates discomfort and/or interferes with the job. It can take the form of verbal abuse, such as insults, suggestive comments and demands, leering, subtle forms of pressure for sexual activity; physical aggressiveness such as touching, pinching and patting. . . . Conduct constitutes sexual harassment when:

* * * *

Such conduct has the purpose or effect of interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

* * * *

This prohibition applies to all state agency heads, managers, supervisors, and employees (whether classified or unclassified).

HR-101

Section IV, F

"The . . . 'Standardized Guide for Disciplinary Action' shall be used to determine the appropriate penalty for various infractions. Additionally, there may be *other types* of conduct for which disciplinary action is appropriate which *may not be included* in the standard guide such as violations of particular work rules."[20]

Section IV, G

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[19] Joint Exhibit 9.

[20] (emphasis added).

"The *seriousness* of the offense and the *disciplinary record* of the employee shall be considered in determining the level of disciplinary action to be taken.[21]

Hospital Policy HR-104

IV. Definitions

A. Sexual harassment means any physical or verbal *conduct of a sexual nature* as well as *repeated* and *unwanted* sexual requests and advances. The specific behaviors that are prohibited include but are not limited to:[22]

1. Repeated, offensive sexual flirtation, advances, propositions.

* * * *

6. Leering, pinching, patting, and swearing, particularly when sexual terms are used.

* * * *

8. Unwelcomed questions or discussions about one's personal sex life.

* * * *

12. Requests or instructions that *clothing be worn* for sexual effect.[23]

Ohio's Policy Prohibiting Sexual Harassment

Sanctions and Disciplines

Any manager, supervisor, or employee who violates this policy either by engaging in the conduct or by allowing the conduct to go unaddressed will be disciplined. Forms of discipline will be dependent upon the terms of any applicable union contract and the *severity* of the incident. Such discipline may include counseling, reprimands, suspensions, and/or *removal*.[24]

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[21] (emphasis added).

[22] (emphasis added).

[23] (emphasis added).

[24] (emphasis added).

STANDARD GUIDE FOR DISCIPLINARY ACTION
PENALTIES

NEGLECT OF DUTY	FIRST OFFENSE	SECOND OFFENSE
Verbal or physical action or inaction toward public and/or clients where safety and health are endangered.	6 Day Suspension or Removal	Removal

INCOMPETENCY	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE
Performance at sub-standard levels whereby safety, health or rights of patients are endangered; failure to complete assignments in an appropriate manner, thereby or endangering rights, safety or health of patients.	2 Day Suspension or 6 Day Suspension or Removal	6 Day Suspension or Removal	Removal

V. Summaries of Parties' Arguments

Union's Arguments

1. PWLC must establish both its charges and the propriety of its penalty by clear and convincing evidence, which means proof "beyond a doubt."
2. PWLC committed several procedural errors, including violating the Grievant's Winegarten Rights and filing untimely claims against the Grievant under both PWLC's and departmental policies.
3. Based on past practice, the Grievant's termination is excessive, arbitrary, and capricious.
4. The Grievant's Termination constituted disparate treatment.
5. The Grievant was not insubordinate.

Management's Arguments

1. PWLC discharged the Grievant for just cause—violating PWLC's sexual harassment policy and the provisions of his administrative leave agreement.
2. The Grievant engaged in a pattern and practice of sexually harassing women within his bargaining unit, especially newly-hired female employees.
3. PWLC sustained its burden of proof.
4. The Grievant's sexual harassment of Ms. Beck justifies his dismissal.

VI. Discussion

A. Scope of the Grievant's Actionable Conduct

In its post-hearing brief, PWLC explicitly admitted that the incidents of sexual harassment involving

three social workers—Ms. Buttrom, Ms. Phillips, and Ms. Chyette—were not recent and were included primarily to establish: (1) the Grievant's pattern of behavior against his victims; (2) the Grievant's concentration on females in his own bargaining; and (3) the Grievant's tendency to harass and exploit relatively new or probationary female employees.[25] Subsequently, PWLC discussed the alleged sexual harassment of Ms. Bunthoff, Ms. Patricia Clark, and Ms. Carmen Standifer. However, these incidents were either undated or as stale as those involving the social workers. Consequently, the Arbitrator interprets PWLC's explanation to mean that it did not rely on these alleged incidents when determining whether the Grievant engaged in actionable sexual harassment. In short, PWLC's charges of sexual harassment against the Grievant must stand or fall on the allegations of Ms. Caldwell, Ms. Beck, and Ms. Milton.

B. Quantum of Proof (Measure of Persuasion)

The Union insists that clear and convincing evidence is the proper measure of persuasion in this dispute, given the stigmatizing nature of sexual harassment charges. According to the Union, clear and convincing evidence actually requires proof "beyond a doubt"[26] Also, the Union argues for the application of this measure of persuasion to PWLC's penalty decision, thereby, requiring the Employer to adduce clear and convincing evidence that termination was the proper disciplinary quantum in the instant case. In contrast, PWLC is silent about the proper measure of persuasion but insists that it has proven its charges against the Grievant.

The Union's argument raises a thorny issue in the arbitration of sexual harassment disputes. The proper measure of persuasion in the arbitration of sexual harassment disputes remains a (sometimes hotly) disputed issue. Not surprisingly, each measure of persuasion along this evidentiary continuum enjoys some

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[25] Employer's Brief at 9.

[26] Union's Brief at 2.

arbitral support.[27]

The Union's argument makes two worthy points. First, in disciplinary disputes, employers must bear the burden of proof (or persuasion). Second, a sexual harassment charge implicates an employee's morals and ethics and, hence, can be deeply stigmatizing if proven and somewhat stigmatizing even if merely alleged.[28] Thus, many arbitrators elevate the measure of persuasion from preponderance of the evidence to a standard of clear and convincing evidence in sexual harassment disputes.[29]

On the other hand, the Union falters regarding the quantum of evidence (or the degree or measure of persuasion) required to satisfy the clear and convincing standard. According to the Union, PWLC must establish the existence of a contested fact—such as whether the Grievant touched Ms. Beck's stomach—"beyond a doubt."[30]

The definition suffers from at least three difficulties. First, it effectively collapses the quantum of evidence needed to satisfy the clear and convincing standard with that required for the "beyond a reasonable

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[27] *See, e.g.*, Estelle D. Franklin, "Maneuvering Through the Labyrinth: the Employers' Paradox in Responding to Hostile Environment Sexual Harassment--a Proposed Way Out," 67 Fordham L. Rev. 1517, 1579-81 (1999):

> [D]isciplinary action, particularly discharge, for acts of immorality has been characterized as constituting "economic capital punishment" because of the "enormous social stigma." As a result, many arbitrators have imposed an enhanced standard of proof on the employer in such cases, requiring clear and convincing evidence, and sometimes even proof beyond a reasonable doubt. Of the *eighty reviewed arbitrations* in which the standard of proof was specified, proof by a *preponderance* of the evidence was approved only *nineteen times*. The most prevalent standard was *clear and convincing* proof used in *thirty-three* of the studied arbitrations, with proof *beyond a reasonable doubt* approved in *eight* instances. In addition, *three* cases stated that the evidence met both enhanced standards without specifying which standard was required.

(emphasis added).

[28] *See, e.g.*, King Soopers, Inc. v. United Food & Com. Workers Union, Local 17, 86 Lab. Arb. Rep. (BNA) 254, 258 (1985) (Sass, Arb.) (Adopting reasonable doubt as a measure of persuasion given the threat to the Grievant's relationship with his wife, children, community, co-workers, and society at large).

Also, Arbitrator Sass correctly noted, "Individuals discharged for such reasons are assumed to have little chance of obtaining similar employment." Arbitrator Sass then observed that tort theories of negligent hiring make it even more unlikely that other employers will hire an employee terminated for sexual harassment.

[29] *See supra* Franklin note 29.

[30] Union's Brief at 2.

doubt" (reasonable doubt) standard. Clear and convincing and reasonable doubt are two separate standards. Second, only under the reasonable doubt standard must an employer establish the existence of a contested fact beyond a reasonable doubt. Conversely, the clear and convincing standard is satisfied where the existence of a contested fact is only "highly probable."[31] Finally, the reasonable doubt standard differs from the other two evidentiary standards in one critical respect: it ignores the quantum of evidence supporting the existence of a disputed fact and focuses directly on the degree to which evidence (whatever its quantum) persuades a fact finder that the disputed fact exists.

In contrast, under both the clear and convincing and preponderance standards, fact finders focus on the quantum of evidence supporting the existence of a contested fact, trying to decide the probability of its existence. Yet, asking whether evidence supports the probable (or even highly probable) existence of a contested fact does not directly address whether a lingering reasonable doubt remains about the existence of that fact. One can entertain a reasonable doubt about the existence of a disputed fact even though there is clear and convincing evidence of its existence.

The parties' Collective-Bargaining Agreement does not address a specific measure of persuasion. The Arbitrator therefore selects the clear and convincing standard for essentially two reasons. First, as mentioned earlier, many, if not most arbitrators, seem to subscribe to the clear and convincing standard in sexual harassment disputes.[32] Second, this standard strikes the most equitable balance between the need to protect employees from wrongful or inadvertent stigmatization and the realities of proving an amorphous,

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[31] MCCORMICK ON EVIDENCE 442 (J. W. Strong ed., K. S. Broun et al. contributing authors, 4th ed. 1992). By way of comparison, the preponderance standard is satisfied where the existence of a contested fact is shown to be merely "more probable than its nonexistence" (more probable than not).

[32] *See, e.g.,* Shell Pipe Line Corp. v. Texas-Gulf Fed'n, 97 Lab. Arb. Rep. (BNA) 957, 959 (1991) (Baroni, Arb.) (stating that the arbitrator usually raises the standard of proof in sexual harassment discharge cases to the clear and convincing evidence standard); Colonial Sch. Dist. v. Colonial Transp. Ass'n, 96 Lab. Arb. Rep. (BNA) 1122, 1124 (1991) (DiLauro, Arb.) (concluding that the burden of proof for sexual harassment disciplinary cases is clear and convincing evidence); Sugardale Foods Inc. v. Local 17A, United Food & Com. Workers, 86 Lab. Arb. Rep. (BNA) 1017, 1020 (1986) (Duda, Arb.) (stating the burden of proof for sexual harassment disputes involving discharge is "clear and convincing" evidence).

emotion-laden charge like sexual harassment. To establish the charges of sexual harassment and insubordination, PWLC must establish each element in those charges. Failure to establish any element leaves the charge unsubstantiated and inappropriate as a basis for disciplining the Grievant.

C. Proof of Sexual Harassment

The Union argues that PWLC failed to demonstrate that the Grievant sexually harassed any of the witnesses who appeared at the arbitral hearing. Assessing this fundamental issue involves a two-step process: (1) setting forth the definition of sexual harassment that governs the parties' relationship; and (2) determining whether the arbitral record contains clear and convincing evidence demonstrating that the Grievant's conduct falls within the scope of the parties' definition of sexual harassment.

D. Definition of Sexual Harassment

During the hearing, PWLC presented three documents defining and explaining its sexual harassment policy in essentially the same manner.[33] However, the Arbitrator will focus on the definition in the "Ohio First Team Employee Orientation Packet." Two reasons support this selection. First, the state of Ohio clearly embraced the definition of sexual harassment in that packet. Second, the arbitral record clearly demonstrates that the Grievant received a copy of the Orientation Packet and, thus, has at least constructive (if not actual) notice of PWLC's definition of sexual harassment.[34] The "First Team Packet" defines sexual harassment as follows:

> Sexual harassment . . . [is] any *unwelcome or unwanted* sexual advance for sexual favors, or other *verbal or physical conduct* of a *sexual nature* from someone in the work place that

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[33] Joint Exhibits 6, 8, and 9.

[34] *See* Joint Exhibit 10, line 2 which contains the Grievant's initials indicating that he received a copy of this packet.

Also observe that in Employer Exhibit 2, the Grievant acknowledged having received sexual harassment training on October 2, 1998. This fact is verified in Joint Exhibit 7 which contains the Grievant's signature indicating that he had received the sexual harassment training to which he referred in Employer Exhibit 2. The problem here, however, is that the record does not clearly indicate how sexual harassment was defined in that training session.

Employer Exhibit 9 shows that the Grievant received sexual harassment training on April 4, 1989 and that included in that training was some discussion of what constitutes sexual harassment. Again, however, there is no clear indication of how sexual harassment was defined during that training session.

creates *discomfort and or interferes with the job*. Conduct constitutes sexual harassment when:

* * * *

such conduct has the *purpose or effect* of interfering with an individual's *work performance* or creating an *intimidating, hostile or offensive* work environment.[35]

The salient elements of this definition are that the conduct in question must be: (1) verbal or physical; (2) unwelcome or unwanted; (3) of a sexual nature; and (4) creates discomfort.

Two additional factors are noteworthy. First, conduct may also satisfy (4) above if the conduct has the *purpose or effect* of interfering with an individual's work performance or creating an *intimidating, hostile* or *offensive* work environment.[36] Second, though it is not explicitly stated in Ohio's definition, it is understood that conduct must be based on a victim's gender or sex to qualify as sexual harassment.

With this definition as a backdrop, the task now is to assess whether the Grievant's demonstrated conduct toward Ms. Caldwell, Ms. Beck, and Ms. Milton falls within the perimeters of the foregoing definition of sexual harassment. To make this determination, the Grievant's conduct toward each of these employees will be examined in light of each element in the foregoing definition.

E. Verbal or Physical conduct

The record clearly shows that the Grievant's conduct toward Ms. Caldwell, Ms. Beck, and Ms. Milton was either verbal, physical or both. In Ms. Caldwell's case, the conduct was verbal. The Grievant repeatedly inquired about her fingernail and toenail polish and, on one occasion, asked her to wear sandals the next day so that he could see her toenail polish. Finally, the Grievant invited Ms. Caldwell to lie on the couch in his office and discuss her marital difficulties.

The Grievant's conduct toward Ms. Beck involved both verbal and physical conduct. For example, within a nine-month period, he either commented or inquired about the color of her nail polish approximately

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[35] Joint Exhibit 9 (emphasis added).

[36] (emphasis added).

100 times. Moreover, on several occasions, he made physical contact with her, rubbing her back and shoulders, touching her hips and upper abdomen, and placing his hands on her hips in order to pull her closer to him.

The record reveals that the Grievant's conduct toward Ms. Milton was also verbal and physical but predominantly physical. He rubbed her shoulders in her office, rubbed her arm in a hallway at work, and massaged her toes through her open-toed shoes.

F. Welcomeness of the Grievant's Conduct

Under Ohio's definition, sexual harassment is not actionable unless the victim deems the alleged conduct to be unwelcomed. The sometimes difficult task is determining whether a victim views the conduct as unwelcome. But that is not the case here. Nothing in the record suggests that any of the three victims either explicitly or impliedly welcomed the Grievant's conduct.

Indeed, each victim distinctly indicated that the Grievant's attention was most unwelcome. Ms. Caldwell specifically voiced her displeasure with his comments about the color of her nail polish and his desire to stroke her hair. Furthermore, her conduct reinforced her words in that she removed her fingernail polish and pulled her hair back the day after he initially mentioned her nail polish and hair.

Unlike Ms. Caldwell, Ms. Beck did not immediately inform the Grievant that his conduct was unwelcome. In fact, she indulged his request to remove her shoes and show him her toenail polish, hoping to thereby end his running commentary about her nail polish. When that tactic failed, Ms. Beck still did not explicitly notify the Grievant that his behavior was unwanted or unwelcomed.

However, her conduct should have notified a reasonable person under the circumstances. On two occasions, the Grievant touched Ms. Beck and she immediately recoiled—once when he touched her hip and stomach and once when he rubbed her shoulders. Those reactions should have afforded the Grievant fair warning that Ms. Beck did not welcome his touch.

Yet, his conduct remained unmitigated and even worsened. Finally, Ms. Beck clearly informed the

Grievant that his conduct was unwelcomed when he telephoned while she was discharging a patient and when he grabbed her and drew her closer to his body.[37]

One need not tarry long in assessing whether Ms. Milton found the Grievant's conduct to be unwelcome. When he rubbed her shoulders, she threatened him with a pair of scissors; when he rubbed her arm, she explicitly asked him to keep his hands off of her; and when he massaged her toes, she kicked at him with sufficient force to propel her shoe off her foot. Under these circumstances, it is perhaps an understatement to say that Ms. Milton found the Grievant's conduct to be unwelcome.

G. Sexual Nature of the Grievant's Conduct

Except for the Grievant's inordinate attraction to women's fingernail and toenail polish, his conduct toward Ms. Caldwell, Ms. Beck, and Ms. Milton was clearly sexual in nature. This much is implicit in the foregoing discussion of welcomeness.

On the other hand, the sexual nature or content of his comments and inquiries about the nail polish of these employees is less clear but still existent. Other matters equal, a comment or two about a female's nail polish does not necessarily constitute sexual conduct.[38] In the instant case, several factors tend to highlight the sexual content beneath the surface of the Grievant's comments and inquiries about the victims' nail polish. First, the virtual interminability of this conduct and his expressed attraction to women who take

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[37] Even if Ms. Beck had never verbally expressed her disapproval of the Grievant's conduct toward her, there still is another avenue to assessing welcomeness as suggested in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). In Meritor, the victim frequently capitulated to her harassing supervisor's demands for sexual intercourse. Yet, Meritor flatly rejected the notion that such voluntariness or acquiescence to sexual demands is the correct approach to determining whether the sexual conduct was unwelcome. (*Id.* at 67) Thus, the Court specifically stated: "The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome." A careful reading of Meritor suggests that the discrepancy in power between victims and their harassers could be pivotal in assessing the welcomeness of sexual conduct. In the instant case, Ms. Beck credibly testified that she did not rebuke the Grievant earlier because she was a probationary employee who feared retaliation. In fact, that retaliation materialized, albeit from the Grievant's supporters. It is entirely reasonable and understandable that even a senior (let alone a probationary) employee would experience reluctance to confront a harasser with the Grievant's power or authority.

[38] Having said this, however, one must recognize that *any* human conduct can assume sexual overtones under the right circumstances. That is, a harasser can pour sexual content into even the most innocent human behavior.

care of their feet have a distinct sexual flavor. Second, the Grievant's desire to touch these females sexually taints his apparent fixation on their nail polish.

Finally, some regard it as common knowledge that an inordinate attraction to the feet of the opposite sex is inherently sexual. In any event, the record clearly and convincingly supports a ruling that the Grievant's conduct—touching the victims and obsessing over their nail polish—is sexual in nature.

H. Impact of the Sexual Harassment on the Victims —The Hostility Criterion

The final part of Ohio's definition of sexual harassment is the element of hostility, which requires that the alleged sexual conduct causes a victim "discomfort." Instead of interpreting "discomfort" as distinct from the "purpose or effect" language in the definition, it makes more sense to view the "purpose or effect" language as defining the level of discomfort that must exist for PWLC to satisfy the hostility criterion. In other words, the actionable or requisite level of "discomfort" occurs where, "conduct has the purpose or effect of interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.[39]

Observe also that PWLC erroneously argues that the sole criterion for evaluating the hostility criterion is whether the sexually harassing conduct "creates a hostile environment in the mind of a *reasonable person.*[40] In *Harris v. Forklift Systems, Inc.*,[41] the United States Supreme Court refashioned the hostility criterion that it announced in *Meritor Savings Bank v. Vinson.*[42] *Harris* held that:

> [C]onduct that is not severe or pervasive enough to create an *objectively hostile* or abusive work environment--an environment that a *reasonable person* would find hostile or abusive--is beyond Title VII's purview. Likewise, if the victim does not *subjectively perceive the environment to be abusive*, the conduct has not actually altered the conditions of the

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39 Joint Exhibit 9 at 22.

40 Employer's Brief at 24, citing Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986)(emphasis added).

41 510 U.S. 17 (1993).

42 477 U.S. 57 (1986) (emphasis added).

victim's employment, and there is no Title VII violation."[43]

Thus, by requiring a determination that the sexual harassment would offend a reasonable person and actually offended the victim, *Harris* embraced a two-tier (objective and subjective) approach to assessing the hostility criterion.

The task here is to determine whether the Grievant's conduct towards Ms. Caldwell, Ms. Beck, and Ms. Milton satisfies the hostility criterion in Ohio's definition of sexual harassment. It is not clear that the Grievant's conduct towards Ms. Caldwell interfered with her work performance. Although she made a number of medication errors, nothing in the record links those errors to the Grievant's focus on her nail polish, his interest in her hair, or his invitation to lie on his couch and discuss her marital situation.

Nor does clear and convincing evidence show that the Grievant's conduct created an "intimidating, hostile, or offensive work environment for Ms. Caldwell. Ms. Caldwell mentioned being upset on only two occasions: the day after the Grievant first approached her and once after he became aloof following her rejection of his offer to lie on his couch and discuss her marital situation.

In fact, several pieces of unrebutted evidence in the record indicate that Ms. Caldwell was quite willing to stand up to the Grievant. For example, she assigned a patient to a new room without the Grievant's permission and flatly rejected the Grievant's request to reassign the patient to the original room. Also, she once publically teased the Grievant about his obsession with nail polish. Finally, she seemed willing to defy the Grievant by playing her "ace in the hole." This behavior is inconsistent with a finding that Ms. Caldwell was intimidated or suffered a hostile or offensive work environment because of the Grievant's conduct.

In contrast, the record clearly establishes that the Grievant's conduct toward Ms. Beck interfered with her ability to do her job and created a hostile and intimidating work environment for her. On at least one occasion, the Grievant's inquiries about Ms. Beck's nail polish interfered with her efforts to discharge

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[43] Harris at 21-22.

a patient. Also, Ms. Beck credibly testified that the Grievant's conduct contributed to her migraine headaches, her sleeping for twelve hours, and her inability to concentrate. The Grievant's refusal to work with Ms. Beck after she rejected his nail-related requests also interfered with her ability to perform her job. Although, the Grievant did not directly cause Ms. Beck to resign, his behavior ultimately led to her reporting him to the Employer, which in turn caused the Grievant's supporters to intimidate Ms. Beck into resigning. But for the Grievant's conduct, she would not have resigned. The Arbitrator holds that the Grievant's conduct would have created an intimidating and hostile environment for a reasonable person under the same or similar conditions as Ms. Beck and did if fact create such an environment for Ms. Beck.

The record does not clearly and convincingly demonstrate that the Grievant's conduct adversely affected Ms. Milton's job performance. In fact the record is silent on this point. Nor does the record demonstrate that the Grievant's harassment was sufficiently pervasive to charge Ms. Milton's work environment with intimidation and hostility. For example, Ms. Milton immediately confronted the Grievant when he harassed her. She sternly warned him to keep his hands to himself and threatened physical violence against him. In addition, Ms. Milton testified that she did not officially report the Grievant's behavior because she handled the problem. Ms. Milton's verbal and physical reaction to the Grievant's harassment as well as her testimony are inconsistent with any proposition that her work environment was either hostile or intimidating.

Regardless of whether a reasonable person would have been intimidated by the Grievant's conduct, Ms. Milton clearly was not. Consequently, the Arbitrator holds that PWLC did not satisfy the hostility criterion in this instance.

The remaining issue is whether the Grievant created an offensive work environment for Ms. Milton. Again, evidence in the record does not support this proposition. This is not to say that Ms. Milton was not offended by the Grievant's physical contact with her when it occurred. However, it is not clear that the offensiveness reached beyond the three established incidents to pervade and contaminate Ms. Milton's work

environment. In the Arbitrator's view, the offensiveness of the Grievant's harassing conduct did not linger in the air but evaporated shortly after the offensive physical contact. The record suggests that so long as the Grievant kept his hands to himself, Ms. Milton experienced no feelings of offensiveness.

I. Sex-Based Nature of the Grievant's conduct

Implicit in Ohio's definition of sexual harassment is that the alleged sexually harassing conduct was based on the victim's sex or gender. This element is easily satisfied with respect to all three victims because the Grievant focused his sexually harassing attention solely on female employees.

The foregoing discussion reveals that only Ms. Beck established a case of actionable sexual harassment under Ohio's definition of sexual harassment. Because Ms. Milton and Ms. Caldwell failed to satisfy the hostility criterion, their cases do not rise to the level of actionable sexual harassment.

J. Insubordination

PWLC charged the Grievant with insubordination for violating the provisions of his agreement for paid administrative leave.[44] Specifically, PWLC points out that the Leave Agreement required the Grievant to, "remain available to be contacted by my office between the hours of 8:00 a.m. to 4:30 p.m Monday through Friday."

According to PWLC, the violation occurred because the Grievant was not at home to receive Mr. Murphy's telephone calls on November 20, 23, and 24, 1998 at 3:30, 12:15 p.m., and 10:05 a.m. respectively. On November 20, Mr. Murphy asked the Grievant's wife to have the Grievant contact him; on November 23, Mr. Murphy left a message on the Grievant's answering machine, requesting that the Grievant contact him; and on November 24, Mr. Murphy again asked the Grievant's wife to have the Grievant contact him. At that time, the Grievant's wife indicated that she had given the Grievant the November 20 message to return Mr. Murphy's call.

Also, PWLC properly notes that even if the Grievant left home to meet with his union delegate, he

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[44] Joint Exhibit 4.

should have notified Ms. Banks' office of his whereabouts. Finally, PWLC contends that the phrase "my office," in the Leave Agreement, includes Mr. Murphy's office.

In response, the Union claims that Dr. Maurant met with the Grievant on the three days in question to discuss and develop the Grievant's case. But as noted above, this is not a justification for failing to contact Ms. Banks' office. Also, the Union argues that the Leave Agreement does not prohibit the Grievant from taking a lunch break. This argument suggests that the Grievant was at lunch when Mr. Murphy tried to contact him. In fact, Dr. Maurant testified that he and the Grievant were discussing the Grievant's case at a Burgerking restaurant when Mr. Murphy tried to contact the Grievant. Finally, the Union interprets "my office" to mean only Ms. Banks' office and not Mr. Murphy's office.

1. Proof of insubordination

As pointed out above, to base a disciplinary action on a particular charge, an employer must establish all elements of that charge. In this case, the applicable definition in PWLC's penalty table defines insubordination as, "Intentional refusal to obey instructions or orders in a matter unrelated to patient care."[45] However, arbitrators traditionally add the following five refinements to such a definition: (1) the employee received a clear order; (2) the person giving the order was authorized to do so; (3) the employee understood the order; (4) the employee knew or understood that failure to follow the order could result in discipline; and (5) the employee deliberately disobeyed the order.[46] Consequently, these refinements will be used to evaluate PWLC's charge of insubordination.

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[45] Joint Exhibit 5 at 9.

[46] *See, e.g.*, In re Consolidation Coal Co., 77 LA 927 (Nelson, 1987); In re Prismo-William Armstrong Smith Co., 73 LA 581 (Jedel, Arb. 1979); In re Stone Container Co., 106 BNA LA 475 (Gentile, Arb. 1996); In re Cheltenham Nursing Center, 89 LA 361 (DiLauro, Arb. 1987); In re Brotherhood of Railway Carmen, 77 LA 694 (Thornell, Arb. 1981); In re Georgia Power Co., 87 LA 800 (Byars, Arb. 1986); In re North Electric Co., 46 LA 813 (Klein, Arb. 1966); In re Bliss & Laughlin Co., 49 LA 231 (Larken, Arb. 1967)).

a. Clarity of the Order

In this context a clear order is one that is clear on its face. In other words, one need not resort to interpretative strategies or tools to ascertain the meaning of a clear order. In this case, the pith of the insubordination dispute lies in the parties' conflicting interpretations of the second paragraph of the Leave Agreement which provides in relevant part: "You will be in a paid status and are to remain *available* to be contacted by *my office* between the hours of 8:00 a.m. and 4:30 p.m. Monday through Friday." "My office" and "available" are the problematic phrases in the second paragraph. The parties explicitly address "my office" but essentially ignore "available." Nevertheless, both are important and, thus, are addressed below.

The first issue is whether "my office" is clear on its face. If so, then it satisfies the first element of an insubordination charge. In the context of the Leave Agreement, "my office," on its face, means Ms. Banks's office, since she signed the Leave Agreement. Nothing in the record extends the scope of that phrase to include Mr. Murphy's office.

The ambiguity that envelops "my office" arises from the issue of whether that phrase reasonably includes Mr. Murphy's office. It so, then, according to PWLC, the Grievant should have expected attempted communications from Mr. Murphy's office. If not, then, according to the Union, the Grievant had no reason to expect telephone calls from Mr. Murphy's office and was under no obligation to be at home when Mr. Murphy telephoned him. The difficulty is that both arguments are wide of the mark. As pointed out earlier, "my office" means Ms. Banks's office. Therefore, the Grievant had no reason to expect Mr. Murphy's office to contact him at home. But that conclusion does not address the real issue.

The pivotal issue with respect to clarity is whether the Grievant remained available for contact from Ms. Banks's office. "Available" is not ambiguous on its face. A reasonable interpretation of remaining available is to remain where one can be contacted. The ostensible purpose for requiring the Grievant to remain available is to assure that Ms. Banks' office could communicate with him if necessary.

The conflict between the Union and PWLC on this issue is whether remaining "available" means

remaining at home during the restricted hours of the day. Manifestly, it does not. For one can leave home and still remain completely "available" in the sense of being accessible for communications or other reasons. Yet, by stressing that the Grievant was not at home when Mr. Murphy tried to telephone him on three different occasions, PWLC implicitly interprets "available" as meaning remaining at home during the hours in question. That is an unduly cramped definition.

There is more, however. Under the commonsense interpretation of "available," the Grievant was obliged to inform Ms. Banks' office of his whereabouts during the restricted periods on Mondays through Fridays. As noted earlier, "available" means remaining accessible to communications from Ms. Banks' office. Any reasonable person under the same or similar circumstances as the Grievant would understand this basic obligation under the Leave Agreement. That "available" suffered from a subsequent latent ambiguity as to its relationship to remaining at home does not render it ambiguous on its face. Yet, the Grievant failed to take this simple step, which is especially reasonable where, as here, he was on paid leave.

Although facially acceptable, the Union's argument that the right to take a lunch break was implicit in the Leave Agreement crumbles under close scrutiny. First, it is unlikely that the Grievant just happened to be on lunch break at 12:15 p.m., 10:05 a.m., and 3:30 p.m. on Monday, Tuesday, and Friday respectively. Second, even if one discounts this unlikelihood, the fact remains that when Mr. Murphy telephoned the Grievant at his home, the Grievant was as unavailable to Ms. Banks' office as he was to Mr. Murphy's, since neither office knew of his whereabouts. Mr. Murphy's telephone calls simply exposed this violation. Consequently, the Arbitrator holds that available is not ambiguous in the context of the Leave Agreement.

The remaining elements of an insubordination charge are clearly established. For example, Ms. Banks ordered the Grievant to remain available and, she clearly had the authority to issue that order. Nothing in the record suggests that the Grievant did not understand the provisions of the Leave Agreement. In fact, the Union does not seriously raise such a contention. Finally, as a union delegate, the Grievant knew or should have known that failure to comply with the provisions of the Leave Agreement could and probably

would trigger more disciplinary action. The upshot is that the Grievant violated a clear provision of the Leave Agreement by not remaining available to Ms. Banks's office. Consequently, the insubordination charge is sustained.

K. Effect of Grievant's Silence

PWLC invites the Arbitrator to draw a negative inference from the Grievant's failure to testify at the arbitral hearing. Some arbitrators readily accept that invitation. However, in this case such an inference is unnecessary to the resolution of the dispute. PWLC has proven its insubordination charge and one charge of discrimination.

L. Winegarten Rights

During the hearing, but not in its post-hearing brief, the Union suggested that PWLC deprived the Grievant of his Winegarten rights. However, the Union never developed that argument and the Arbitrator can find no evidence in the record to support that allegation.

M. Untimely Sexual Harassment Claims

Similarly, the Union alluded to the untimeliness of PWLC's sexual harassment charges but never developed that argument. If the Union was referring to allegations other than those of Ms. Beck, Ms. Caldwell, or Ms. Milton, then the Arbitrator has already excluded those allegations from consideration so far as the penalty decision is concerned. If the Union is addressing other timeliness issues, the Arbitrator is unaware of them and finds no evidence in the record to either identify or support them.

N. Disparate Treatment

Finally, the Union claims that the Grievant was a victim of disparate treatment essentially because PWLC did not discipline Ms. Caldwell for having committed at least five medication errors. In this respect, the Union essentially argued that the medication errors jeopardized patients' health and well being and, thus, warranted discipline as set forth in the penalty table. PWLC, on the other hand, argues that Ms. Caldwell's medication errors were relatively harmless level one errors that did not seriously threaten patients' well

being.[47] Without more evidence and data as to the nature of Ms. Caldwell's errors and their potential consequences, the Arbitrator is in no position to address the allegation of disparate treatment, which requires similar treatment of the similarly situated. However, to determine whether the requisite similarity exists, one needs more information about Ms. Caldwell's errors. Because the Union has the burden of proof on this issue, doubts are resolved against the Union. Finally, there is the allegation that Ms. Clark performed a sexual dance on a conference table without being disciplined. However, the record again lacks insufficient evidence to permit the type of comparative analysis needed to render a holding on this allegation.

O. Penalty Decision

1. Sexual Harassment

PWLC charged the Grievant with insubordination and failure of good behavior—sexual harassment. PWLC fully sustained the charge of insubordination. However, based on Ohio's definition of sexual harassment, PWLC proved sexual harassment only in Ms. Beck's case. That is, PWLC established all necessary elements of sexual harassment in Ms. Beck's case. Because PWLC established charges of sexual harassment and insubordination, some measure of discipline is warranted. The remaining issue is what measure of discipline is warranted under the circumstances of this case.

The Union argues that termination, in this case, is arbitrary, capricious, and unreasonable in light of the Grievant's fifteen years of loyal service, his spotless disciplinary record, and the lack of progressive discipline. Also, the Union raised but failed to prove disparate treatment, which if established might very well have tainted the decision to discharge with arbitrariness, capriciousness, or unreasonableness. As matters stand, however, the Union's argument that the penalty is arbitrary, capricious, and unreasonable must stand or fall on the basis of the Grievant's tenure, disciplinary record and lack of progressive discipline.

In contrast, PWLC essentially argues that the seriousness of the Grievant's behavior warrants

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[47] Employer Exhibit 4.

termination . Second, PWLC argues that its penalty table contemplates termination for offenses like sexual harassment. Before proceeding with a discussion of aggravating and mitigating circumstances, a response to PWLC's second argument is warranted.

PWLC's second argument, which it draws from page ten of the penalty table, is unpersuasive.[48] First, PWLC argues that the absence of any explicit penalties in this section of the penalty table gives permits Management to select from a broad range of penalties because violations in this section are egregious. Second, PWLC contends that the footnote at the bottom of page ten mentions acts of discrimination, which includes sexual harassment. According to PWLC, offenses listed in that footnote are subject to penalties that are proportional to the offense and the accompanying circumstances.

PWLC's arguments are unpersuasive. First, the violations on page ten specifically deal with "patient abuse or neglect." Similarly, the footnote that addresses discrimination and other infractions also falls under the heading "patient abuse or neglect." Second, it hardly furthers analysis to argue that penalty selection in this part of the penalty table should be proportional to the seriousness of the offense and the surrounding circumstances. Those considerations permeate (or should permeate) all penalty decisions. Thus, PWLC's attempt to apply page ten of its penalty table to the instant case fails because that section does not address the Grievant's misconduct and adds nothing new to the penalty decision making process.

2. Progressive Discipline

Article 8.02 explicitly provides for progressive discipline: The principles of progressive discipline shall be followed."[49] Ohio's sexual harassment policy also explicitly recognizes the general applicability of progressive discipline by providing a range of penalties for sexual harassment:

> Any manager, supervisor, or employee who violates this policy either by engaging in the conduct [sexual harassment]. . . will be disciplined. Forms of discipline will be dependent upon the terms of any applicable union contract and the *severity* of the incident. Such

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[48] Joint Exhibit 5.

[49] Joint Exhibit 1 at 23.

discipline may include *counseling, reprimands, suspensions*, and/or *removal*.[50]

On the other hand, progressive discipline is not applicable in all situations and it's application turns on several enumerated factors. For example, although Article 8.02 generally provides for progressive discipline, it explicitly recognizes that limitations to the applicability of that principle: "The application of these steps [of progressive discipline] is contingent upon the type and occurrence of various offenses." Similarly, HR-101, Section IV, G provides: "The seriousness of the offense and the disciplinary record of the employee shall be considered in determining the level of discipline imposed."[51] Finally, Ohio's sexual harassment policy also recognizes this limitation: "Forms of discipline will be dependent upon the terms of any applicable union contract and the *severity* of the incident." Thus, the parties Collective-Bargaining Agreement and other regulations make clear that progressive discipline is not applicable in all situations. Limiting factors include: "[T]he type and occurrence of various offenses, the seriousness of the offense and the disciplinary record of the employee, and the *severity* of the incident."

The most efficient and effective method of assessing these factors is through the assessment of aggravating and mitigating circumstances. There are several aggravating factors in this case. First, there is the seriousness of the Grievant's sexually harassing conduct. In this respect, the Grievant subjected Ms. Beck to a virtually unrelenting, debilitating stream of sexual conduct that contributed to several physical ailments and ultimately led to her being forced to resign. A second aggravating factor is that the Grievant's conduct was intentional and inflicted with full knowledge such conduct was entirely unacceptable and prohibited. Third, the Grievant's conduct is prohibited not only by PWLC's rules but also by federal law. Thus, the Grievant's conduct could very well have caused PWLC to suffer the potentially ruinous consequences of a federal law suit. Fourth, his conduct is all the more offensive and inexcusable, given his leadership role as a physician and a Union Delegate and his exploitation of that position of leadership and

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50 Joint Exhibit 8 at 2 (emphasis added).

51 Joint Exhibit 5at 2.

trust. Sixth, the Grievant aggravated his circumstances by violating a clear provision of his Leave Agreement—failing to remain available during restricted hours. Although, under PWLC's table of penalties, insubordination, standing alone, does not necessarily justify discharge, [52] it is a legitimate basis for enhancing an otherwise justifiable penalty.

Conversely, several mitigating factors are apparent in this case. First, the Grievant has given fifteen years of loyal, highly professional service in the field of mental health, a commendable feat. Second, the Grievant comes to this dispute as a fifteen-year employee with a spotless disciplinary record, another commendable accomplishment. Taken together, these accomplishments might justify mitigation under other less egregious circumstances.

3. Failure to Prove All Charges

As a separate mitigative factor, PWLC proved only one of three sexual harassment charges. Further discussion is indicated to place this factor in the proper perspective. Generally, arbitrators decline to sustain a penalty based on multiple charges if each charge is not established.[53] However, as with any general rule, exceptions exist. For example, it is one matter to require proof of all charges relied on to terminate an employee if no single charge, standing alone, would ordinarily support a termination. That is, the termination or penalty depends on the cumulative effect of all the charges. It is, however, another matter to

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[52] Joint Exhibit 5 at 9.

[53] *See, e.g.*, Grant Hospital of Chicago and Hospital Employees Labor Program of Metropolitan Chicago, 88 Lab. Arb. (BNA) 587, 600 (Wolf, Arb. 1986) stating:

> Ordinarily, where an employer discharges an employee for a combination of offenses or rule violations, it must prove all the charges. The Arbitrator must assume that the Hospital would not have discharged Grievant if she were guilty only of insubordination, [FN10] even though insubordination is a serious offense which may warrant discipline, including discharge. In my opinion, however, if Grievant's initial falsifications alone could be considered as a basis for discharge, it would not justify her termination.

require proof of all charges where each individual charge, if proven, would ordinarily sustain a discharge.[54]

PWLC charged the Grievant with three episodes of sexual harassment any one of which could have justified his termination, had PWLC established the sexual harassment charges of either Ms. Milton or Ms. Caldwell rather than those of Ms. Beck. Under these particular circumstances, the Arbitrator holds that there is an exception to the general principle of requiring employers to sustain all charges in order to sustain the penalty.

Finally, the record shows that the Grievant had adequate notice of the potential disciplinary consequences of sexual harassment. This is particularly true in this case because the Grievant was a long-standing Union Delegate. To fulfill the duties of that position, he was obliged to study and understand the types of disciplinary rules, their scopes, and applicability. Therefore, he cannot be heard to claim ignorance of these rules.

VII. The Award

Ultimately, the aggravating factors outweigh the mitigating factors in this case. Therefore, for all the foregoing reasons, the grievance is hereby DENIED.

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[54] Suppose for example, that an employee is charged with three episodes of misconduct any one of which warrants termination the first time, e.g., gross insubordination or fighting. Suppose only one episode of such misconduct is proven. Does failure to prove the other two episodes justify setting aside the discharge where a discharge almost certainly would have been sustained if only one episode was alleged and proved? The answer is that setting aside a termination where only one of three dischargeable offenses is proven makes no sense if termination would have been sustained if only one dischargeable offense had been alleged and proved. So it is with sexual harassment.