

Arbitration between:

International Association of Machinists and
Aerospace Workers Lodge No. 186,

Union,

and

Diageo North America, Inc.

Employer,

regarding the discharge of V.

FMCS Case No. 061108-50984-1

BEFORE: PAUL GREENBERG, Arbitrator

Appearances:

For Machinists Lodge No. 186:

Vicki L. Fultonberger, *Area Director, Baltimore, Maryland*

For Diageo North America, Inc.:

Thomas P. Dowd, Esq., *Little Mendelson, P.C., Washington, D.C.*

DECISION

This case involves the discharge of V. (Grievant) by his employer, Diageo North America, Inc. (Diageo or Employer) on May 10, 2005. According to Diageo, Grievant was terminated because he engaged in sexually harassing conduct toward a female co-worker, which violated the Employer's working rules and its Policy Against Harassment and Retaliation. Employer Exhibit (EX) 2. Grievant's union, the International Association of Machinists (IAM) challenges the termination.

The immediate event that precipitated Grievant's discharge was an incident of alleged sexual harassment that occurred April 29, 2005, when Grievant showed a female co-worker ("R") a sexually explicit photograph while on the plant floor. Both Grievant and R testified regarding the incident at the grievance arbitration, and there are only minor differences in their recollection of the event. Thus the facts involving the main incident in this case are not significantly disputed. In addition to testimony regarding the April 29 event, Diageo's witnesses also testified to prior incidents involving Grievant to provide additional context supporting management's decision.

The central question to be decided is whether Grievant's conduct on April 29, 2005, was sufficient cause to support Diageo's decision to fire him. Three witnesses were called by Diageo: Co-worker R; Daniel Feezer (Special Products Operations Manager); and Tom Krekeler (Vice

President - Supply). Informally, Krekeler is referred to as the Plant Manager. Grievant was the sole witness called by the IAM.

BACKGROUND

Diageo operates a bottling and package plant for alcohol beverage products in Relay, Maryland. Workers at the facility are represented by several unions. The largest bargaining unit at the site is represented by the United Food and Commercial Workers (UFCW). The IAM Lodge 186 represents the second-largest bargaining unit at the plant.

At the time of his discharge, Grievant was employed as a maintenance machinist, a job classification within the IAM unit. He had worked at the plant for Diageo and its predecessor, Joseph Seagram & Sons, for 28 years.

R is classified as a sanitation worker, a position within the UFCW unit. She has worked at the Relay facility since 2000.

Allegations of improper "touching" in 2004 – R and Grievant have known each other since R came to the plant. According to R, she generally had a normal co-worker relationship with Grievant. However, R testified that in 2004 she had an encounter with Grievant in which he grabbed R's behind while she (R) was standing on a production line handpacking bottles. R states she was unable to move away from the production line at that point, but shouted "hey" to Grievant to register her objection. R testified Grievant repeated the grabbing incident a day later, at which point she confronted Grievant and told him the touching had to stop. According to R, Grievant apologized and promised it would not happen again, and R testified there were no further harassing-type incidents between herself and Grievant until the event of April 29, 2005. She testified she did not file a complaint against Grievant over the touching incidents, explaining that she preferred to address these kinds of problems directly with her co-worker, *i.e.*, Grievant.

Grievant offered a different version of the 2004 incidents. Grievant testified there is a limited space of only about 3 to 3-1/2 feet between the production station (where R was working) and a wall. Grievant denied intentionally touching R while she worked on the production line, explaining that any contact between himself and R was accidental and incidental to his (Grievant's) need to work close to the production line when maintaining or adjusting equipment.

Although Plant Manager Krekeler was not a witness to either of the alleged touching incidents in 2004, he challenged Grievant's explanation that any contact between himself and R was accidental and merely the consequence of working in a narrow space. Krekeler testified there was ample room between the production station and the wall for an employee to pass production workers without coming into physical contact with them.

The April 29, 2005, photograph incident – R testified she was at work on the plant's bottling floor on Friday, April 29, 2005, when Grievant approached her and told her he had something to

show her. She followed him behind a stack of pallets, and he proceeded to show her a photograph of a woman performing oral sex on a man. Grievant told her the picture was a photograph of himself and his first wife. R testified she was shocked and upset by the photograph, which she characterized as “perverted.” She walked away from Grievant and retreated to a sanitation closet. She states Grievant followed her and stood outside the closet, but she then went to a female co-worker and struck up a conversation.

According to R, she subsequently spoke with a co-worker, “W,” about the photograph incident, and also spoke with her UFCW shop steward, Jeannie Bush. R did not, however, go to management to file a complaint. Nonetheless, Feezer and a second Diageo manager, Keith Swinson, learned of the incident and contacted Plant Manager Krekeler the following Monday morning to advise him that something had happened that might require management attention. According to Krekeler, Swinson had heard about the incident from a UFCW shop steward, who also reported that word of the event was spreading rapidly through plant.

Krekeler sought out R that afternoon and met with her in a conference room near the special products production area. He asked what had occurred. Both R and Krekeler report that R was reluctant to complain, and did not identify Grievant in this initial conversation. However, both state R was visibly upset and still shaken when discussing the incident. When R indicated she was unsure whether she wanted to make a complaint, Krekeler advised her the company would respect her privacy, but no action could be taken against the offending employee unless R identified the person involved.

Later that day R decided to complain about the incident. She had a second conversation with Krekeler in which she identified Grievant as the offending party. Both R and Krekeler testify that during this second contact, R stated she felt “violated” by Grievant’s action. R later had contact with HR Director Gina Woodard about the incident.

Grievant acknowledges showing R the sexually explicit picture, but says he intended it as a joke. Grievant testified that R laughed at the picture and thought it was funny. According to Grievant, the picture was not actually a photograph of him and his prior wife, but instead was a picture clipped out of a magazine. Grievant testified that R asked to speak with him on the Monday following the event and told him then that she was upset about the photograph incident. At the time of this mid-day meeting on Monday, R told Grievant she was unsure what action she might take in response to the incident. Grievant testified he apologized to R and asked her forgiveness. At the time of the hearing, Grievant acknowledged his behavior had been wrong.

The decision to terminate Grievant, and other considerations – Diageo terminated Grievant’s employment for violating the Employer’s “Working Rules and the Policy Against Harassment and Retaliation.”

The Employer’s anti-harassment policy is included in the record. EX 2. Among other things, the policy warns employees against the “display of offensive, suggestive or sexually explicit objects,

pictures [or] posters” and offering “sexually oriented or explicit remarks, including written or oral references to sexual conduct, gossip regarding one’s sex life, body or sexual activities, deficiencies, or prowess.” The policy states that complaints of harassment will be investigated, and “Any employee who is determined to have committed harassment . . . in violation of this policy will be subjected to appropriate corrective and disciplinary action. Appropriate action may range from counseling to termination of employment, depending on the circumstances.”

According to Plant Manager Krekeler, when deciding to discharge Grievant Diageo considered the gravity of the offense as well as additional considerations:

- The Employer requires employees to undergo EEO training periodically, including a review of the sexual harassment policy. An all-hands meeting to review policies was held in mid-March 2005, and Grievant was present at the meeting. Among the items discussed was a report of a plant-wide inspection Krekeler had conducted in which sexually explicit material were found in the plant.¹ The presentation included warnings to all employees that possessing sexually explicit materials on company premises could be grounds for dismissal, even for the first offense. The PowerPoint slides from the presentation are found at EX 3.

In addition to highlighting the anti-harassment policy during the all-hands training session, Krekeler states the anti-harassment policy is posted in three areas of the plant available to employees. Grievant acknowledges being aware of the anti-harassment policy.

- According to Krekeler and Feezer, the company was aware that Grievant had conduct issues, including rude or crude interactions (non-sexual) with co-workers as well as unsubstantiated reports that Grievant was prone to engage in sexually harassing conduct. Feezer and floor supervisor Pam Cushing made a special outreach to Grievant – and to Grievant alone – immediately after the March 2005 plant-wide session, seeking to make sure he understood Diageo’s expectations about employee conduct. According to Feezer, Grievant expressly was warned to improve his interpersonal skills with co-workers, and also was warned to be attentive to the company’s anti-harassment policy. Grievant does not dispute Feezer’s account of these conversations, which were documented in file memos written by Feezer and Cushing. EX 4, 5.
- Around April 13, 2005, a UFCW coordinator reported to Feezer that Grievant allegedly had touched a female employee inappropriately. Feezer met with the female employee, who advised him (Feezer) that as far as she was concerned, nothing had happened. Thus the alleged incident was not substantiated or investigated.

¹ Krekeler acknowledged that Grievant *was not* found to have sexually explicit materials as part of the plant-wide inspection.

However, Feezer and Cushing spoke with Grievant again and emphasized that inappropriate touching was a violation of the company anti-harassment policy and was unacceptable conduct. This conversation also was documented in a file memo. EX 6.

Grievant denies generally that he engaged in rude or abusive conduct toward his co-workers, countering that the genesis of any friction comes from the co-workers rather than himself.

ISSUE PRESENTED

Whether the Employer violated the collective bargaining agreement when it terminated Grievant, and if so, what shall be the remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

Article VI, Management Rights

The Company has exclusive rights within the terms of this Agreement for the management of the Plant and the direction of the working forces, including the right to hire, suspend up to discharge for just cause, and further to relieve employees from duty because of lack of work or other legitimate reasons.

Further, it is understood that the management of the Company's business and the operation of its facilities and methods, scheduling, locations and the right to make and enforcement necessary rules and regulations for a reasonable and orderly operation of the Plant and the authorization to execute all the duties, functions and responsibilities shall be vested exclusively in and retained by the Company. This is provided that the manner of the exercise by the Company of any of the powers stated in these paragraphs shall not violate any provision of this contract or local agreements. However, the right of the Union to bring grievances alleging abuse of these rights is recognized.

Article XX, Discrimination

2. The Employer and the Union agree that there shall be no discrimination against any employee or applicant for employment or union membership because of race, color, religion, sex, national origin, physical or mental handicap under the Americans with Disabilities Act, veteran status or age pursuant to state or federal law.

POSITIONS OF THE PARTIES

The Union's position – Grievant and the IAM do not dispute that Grievant showed a sexually explicit photo to R, and Grievant acknowledges this was a mistake. However, Grievant is a talented mechanic with a very long record of service to the company. Moreover, his formal disciplinary record generally is clean prior to this incident. Under these circumstances, termination for a first offense is excessive.

The Employer's position – The Employer contends Grievant's infraction is the kind of severe violation of its anti-harassment policy that merits termination for a first offense. Although the Employer acknowledges no prior formal complaints of harassing behavior have been made against Grievant, sufficient concerns had surfaced that supervisors made a special outreach to Grievant in March 2005 to make sure he appreciated the importance of the anti-harassment policy; however, notwithstanding this personal warning, Grievant engaged in unacceptable conduct just weeks later.

The Employer is obligated to providing a workplace free of harassing conduct. This is required by federal law (Title VII) and state law (Maryland Employment Practices Act), as well as the IAM and UFCW collective bargaining agreements. Termination for a first offense is appropriate under the circumstances.

DISCUSSION

A. Burden and quantum of proof

In labor arbitrations involving adverse actions, employers normally shoulder the burden of proof in situations where – as here – “just cause” is a prerequisite for imposing discipline. *See* Labor Agreement Article IV, *supra*.

In its post-hearing statement, Diageo observes that “[a]rbitrators generally place the burden on the Employer to demonstrate by a preponderance of the evidence that the Employee did in fact engage in the conduct that serves as the basis for discipline and that the level of discipline is one that is permissible under the applicable rule or policy.” While I agree the *burden* of proof in most adverse action cases is assigned to the employer, the *degree* (or “*quantum*”) of proof required to sustain the employer’s action is less certain.

In most civil disputes, the quantum of proof is the “preponderance of the evidence” standard. However, as this Arbitrator observed in *Sweet Sue Kitchens/Sara Lee Foods*, 120 L.A. 54 (2004) – a decision cited by Diageo in this case – arbitrators often require employers to justify adverse action under an elevated standard if the charge against the employee alleges conduct that might be punishable under criminal law, or where the charge otherwise involves a failure of morals or conduct that is socially stigmatizing. *E.g.*, *Vista Chemical Co.*, 104 LA 818 (Nicholas 1995) (employee discharged for alleged sexual harassment); *Yellow Freight Systems, Inc.*, 106 LA 1062 (Briggs 1996)

(employee accused of dishonesty); *Georgia-Pacific Corp. Building Products Division*, 106 LA 470 (Hooper 1996) (employee accused of bringing marijuana to worksite); *Chicago Transit Authority*, 110 LA 403 (Wolff 1997) (conductor accused of assaulting passenger).

The sexual harassment charge leveled by Diageo against Grievant falls within the class of cases where the “preponderance of the evidence” standard is not sufficient. Sexual harassment is a very serious charge that may have serious impact on an employee’s future work opportunities. Before terminating an employee for alleged harassing conduct, it is reasonable to expect an employer to have very solid evidence that the misconduct actually occurred. When defending a decision to terminate in a sexual harassment, therefore, it is this Arbitrator’s view that an elevated level of proof by the Employer is merited – specifically, proof by “clear and convincing evidence.”

B. The merits of the case

Like all employers, Diageo has an obligation to maintain a workplace free of discrimination based on sex, including sexual harassment. In this case, the obligation is founded in both federal and state law, as well as the Employer’s collective bargaining agreements with the IAM (Grievant’s union) and the UFCW (R’s union). In furtherance of this policy, the record shows Diageo has a written policy prohibiting sexual harassment which was posted in several locations at the plant, and Diageo very explicitly had highlighted its policy against sexual harassment at an all-hands presentation in March 2005. Employees were warned that violation of the policy could lead to termination, even for a first offense. Grievant has admitted being aware of the policy.

The event which precipitated Diageo’s action – Grievant’s showing of a sexually explicit picture to R on April 29, 2005 – is not disputed. The question, then, is whether the incident is of sufficient gravity to constitute “just cause” to support a discharge for a first offense.

The IAM argues that termination is not warranted in this instance in light of Grievant’s very long service with the company, his skill as a mechanic (which readily was acknowledged by Diageo managers), and his clean disciplinary record. To the extent the Employer introduced testimony referring to other alleged confrontations with co-workers or prior acts of sexual harassment, the Union objected because (1) the testimony offered was hearsay and (2) these alleged prior bad acts never became the subject of formal complaints or findings.

In essence, the Union challenges the discharge penalty as disproportionate, portraying the photograph incident as an isolated indiscretion by an otherwise-competent, long-time employee.

I disagree.

First, under the record in this case, it is my conclusion that Grievant’s action is so clearly inappropriate and significant *by itself* that – even standing alone – it would support Diageo’s decision to discharge him. Maintaining a workplace free of sexual harassment is a compelling obligation for employers. A harassment-free work environment is required by law; in addition, providing a

harassment-free workplace stands as a moral obligation that employers owe to their workers.

Human relationships are complicated, even in the workplace, and this Arbitrator does not rule out the possibility that facts might exist that would warrant mitigating a discharge penalty for events like the photo incident. However, I find no such mitigating facts in this instance. Based on the testimony of R (which I found credible in all respects), I find R had not somehow signaled to Grievant that she would welcome this kind of conduct; to the contrary, R already had confronted Grievant in connection with the earlier (2004) alleged touching incidents on the production line, essentially warning him to keep his distance from her. Grievant's act was both uninvited and unwelcome, egregiously violating Diageo's anti-harassment policy and the norms of workplace conduct.

Second, although the IAM is correct in noting that Grievant's alleged prior bad acts never resulted in formal discipline and that the testimony describing the prior acts is largely hearsay, the record shows that management's concerns about Grievant's rumored behavior prompted multiple incidents of one-on-one counseling during the weeks immediately preceding the photograph incident. This counseling included very explicit reminders to Grievant that sexually harassing conduct would be grounds for discipline including possible discharge. Diageo's specific and targeted efforts to remind Grievant that Diageo previously had received unsubstantiated reports of sexually harassing behavior, and to warn him that harassing conduct would be grounds for discipline and possible discharge, lends further justification to the Employer's decision to discharge Grievant in this instance rather than impose a lesser penalty. Grievant plainly was "on notice" that the employer was concerned about potential inappropriate conduct, yet he was unable to conform his behavior to the anti-harassment policy.

It is troubling when a successful long-time employee like Grievant is discharged suddenly for cause. Having observed the testimony at the hearing, it is apparent Grievant seriously misunderstood his relationships with female co-workers, particularly R, and therefore failed to observe normal workplace boundaries. Grievant alone is responsible for his mistake, and he has paid a heavy price. What also is unfortunate, however, is the testimony suggesting that Grievant may have engaged in inappropriate harassing behavior with female employees previously, but the female co-workers declined to file complaints. Possibly the female employees involved in these earlier incidents believed they were doing Grievant a favor when they did not file complaints about his possible misconduct. With hindsight, however, it can be argued that the failure to file complaints regarding earlier incidents ultimately may have made matters worse for Grievant, not better. If these earlier rumors of possible harassing conduct (*e.g.*, the 2004 "touching" incidents involving R) had been reported to management by the alleged victims and then substantiated, it is possible less-drastic discipline at that time might have been an effective warning to Grievant and might have prompted him to change his behavior. Ironically, rather than helping Grievant, the apparent reluctance by co-workers to "create trouble" for him by filing formal complaints instead deferred the day of reckoning until he engaged in such grossly inappropriate conduct that discharge was warranted. If there is a lesson here, it is that both Grievant and his co-workers might have been better served if alleged misconduct issues had been reported to management and resolved when they first arose.

CONCLUSION

I find Diageo has shown by clear and convincing evidence that it discharged Grievant for just cause. The grievance is denied.

Paul Greenberg, Arbitrator
Washington, D.C.

September 25, 2006