LARRY D. TURNER

v. Docket No. 94-DOH-594

WEST VIRGINIA DIVISION OF HIGHWAYS

DECISION

Grievant, Larry D. Turner, is employed by the West Virginia Division of Highways (Respondent) as a Craftsworker II in Preston County. Mr. Turner filed a grievance at level four on October 4, 1994, in which he alleged that a twenty day suspension was imposed upon him effective December 13, 1993, without just cause. An evidentiary hearing was conducted on November 17, 1994, and the matter became mature for decision with the close of responsive briefing on December 27, 1994. (See footnote 1)

The facts of this matter are as follows. By letter dated November 29, 1993, Jeff Black, Director of Respondent's Human Resources Division, notified Grievant that he would be suspended from his duties for a period of twenty working days. The discipline was based upon a charge of sexual harassment, specifically:

After an investigation of the sexualharassment allegations against you, it has been determined that during the months of June, July and August, 1993 you told sexual jokes, teased, made sexual remarks of a gender specific nature and used obscene language that was gender specific or sexual in nature. These remarks were made on more than one occasion in the presence of two female college students who were employed by the Division of Highways and caused them to work in an environment that made them feel uncomfortable, humiliated, embarrassed and unsafe from further harassment.

Mr. Black advised that this conduct was in direct violation of the Division of Highways' Sexual Harassment Policy and Section 703 of Title VII of the Civil Rights Act of 1964. Grievant was suspended from December 13, 1994, until January 10, 1995, and warned that any future infractions of this nature would result in further disciplinary actions up to and including dismissal.

The suspension was the direct result of a complaint filed by Lisa Greaser. Ms. Greaser, a college student, was a temporary summer employee assigned to the Preston County DOH as a laborer in

1993. At the level two hearing Ms. Greaser testified that she had worked with Grievant during the summers of 1991 and 1992. She recalled that during her first summer of employment, joking and profanity had occurred but had not been directed towards her. During the summer of 1992 Grievant continued joking but the tenor of some comments had changed to a sexual nature and were mean spirited. For example, Grievant referred to her as a college brat. Ms. Greaser stated she wasaware that Grievant had filed a complaint that summer because the college students were given overtime work rather than the regular employees. She observed that after that incident Grievant's comments became more sexual and were directed towards her. (T. 12) (See footnote 2)

Ms. Greaser stated that immediately upon her assignment to Grievant's work crew in 1993, he began harassing her by making lewd comments. When asked to give a more specific description of Grievant's behavior, Ms. Greaser explained that her boyfriend was the half-brother of Charlie Cline, Assistant Superintendent in Preston County, and that Grievant picked on her relentlessly about her boyfriend and his family. One specific comment which she recalled was that Grievant had accused her of "sleeping" with all the Clines, including some female members of the family, to get her job. She also recalled that on one Monday morning Grievant inquired as to whether "that Cline boy made [her] come?" Another time he told her that her boyfriend could not give her what she wanted but that he, Grievant, could because he was a "real" man.

Ms. Greaser recalled that Grievant would put his arm around her or put his elbow on her shoulder and make rude sexual comments, such as asking her about sexual positions. He once told her that she would be the boss some day and that he would like it if she would remember him and treat him good. He in turn would keep her happy by "frequenting" under her desk. Another time he commented in her presence that he had to put earplugs in his ears and nose so that he would not have to hear women scream and smell burnt meat. Ms. Greaser stated that Grievant persisted in making these types of statements virtually every day they worked together, despite her telling him "to quit it, to stop, to leave [her] alone, just go away." First, she attempted to act as though it did not bother her, hoping that Grievant would stop. When the behavior continued, she verbally and nonverbally expressed to him that she was upset. As the summer wore on, she perceived the nature of his comments was growing more offensive and more frequent. Ms. Greaser stated that she began to employ a variety of tactics to avoid Grievant. At times she ate lunch in a crew cab, or would go to town or back to the garage during lunch. In the mornings she started sitting inside the office, hoping

that if other people were around, Grievant would not make the comments. In the evening she waited in the office until Grievant would be at his car, or she would walk through the building rather than outside the building to avoid him. Ms. Greaser stated that she asked to be taken off Grievant's crew the day that he accused her of sleeping with the Cline family and offering to frequent her under her desk. After she was transferred from Grievant's crew, Ms. Greaser stated that she would still see him before and after work and that he made use of these opportunities to continue hisharassment. Finally, after a particularly upsetting episode she decided that she could no longer tolerate Grievant's behavior and filed the complaint. She described that incident at the level two hearing as follows:

A: One night when I was walking to my car to go home, he came up to me and he put his arm around me and he said, he was referring to my body and he said, he goes, 'where did you get pants to fit you? Do you have to have them especially made for you?' and it really upset me and I went to my car and I just kept thinking he would stop but he didn't.

Q: So he didn't stop?

A: No, he went out, he followed me out to the car and he attempted to apologize but I did not feel it was sincere because he was laughing the whole time.

Q: Is that an occasion in which you were crying in your car?

A: Yes, I was crying.

(T. p.20)

Ms. Greaser stated that the episode had begun in front of other employees when Grievant had made a comment to the effect that she had a large derriere, and continued on to the parking lot. She was already in her car when Grievant leaned down to "apologize." When Grievant made some attempt to apologize the following morning, Ms. Greaser stated that she believed he was sincere until he started laughing again and continued laughing as he exited the room. It was at that point, she explained, that she realized the behavior was not going to stop and that she could not tolerate it for the remainder of the summer. Not surprisingly, Ms. Greaser stated that she had come to dreadher employment at DOH as a result of Grievant's behavior. Finally, she concluded that she should not dread going to work and that she should not have to go home upset or crying every day.

County Superintendent Butch O'Hagan took Ms. Greaser's complaint to Anthony Paletta, a

Maintenance Management Analyst and EEO officer. After Mr. Paletta reviewed the complaint and an accompanying statement by Debra Miller, a co-worker, he conducted an investigation on August 8-9, 1993. Ms. Greaser provided a written statement in which she briefly described the behavior by Grievant, including specific examples stated previously, which she found to be offensive.

Debra Miller also provided a statement indicating that she had heard several comments made by Grievant to Ms. Greaser, including those regarding the earplugs, that he would keep her happy under her desk, and those relating to her relationship with the Cline family. Ms. Miller stated that she had also heard Ms. Greaser tell Grievant to leave her alone, and had observed Grievant place his arm around Ms. Greaser and whisper in her ear. She was also present on the day that Grievant commented about the size of Ms. Greaser's derriere and observed her crying and Grievant laughing. She heard Grievant's apology and recalled that he "then turned to me and winked and laughed again."

Ms. Miller advised that Grievant had also made sexually oriented comments to her, although not as frequently as he hadto Ms. Greaser. Two examples given by Ms. Miller were when she was talking to Ms. Greaser about visiting a friend over the weekend, Grievant chimed in that she would be happy when she got back on Monday because she would "get a little" on the weekend. On another occasion, Ms. Miller had an English saddle in the back of her truck. Grievant asked her who she was going to ride. When Ms. Miller responded "no one" Grievant offered that she could ride him.

Grievant provided a statement in which he claimed that he had been "joking around" and denied making any comments of a sexual nature. He admitted that a week or so earlier he had made a comment to Ms. Greaser which caused her to cry, but that he had apologized. He further claimed that later that evening he tried to call her to again apologize, but that no one answered and he did not want to leave a message on the machine. He stated that he did apologized to Ms. Greaser a second time the following morning and had since only said "good morning" or "hi" to her. He surmised that his "trouble" with Ms. Greaser and Ms. Miller started when he complained about the overtime being given to the temporary summer (college) workers and not to the regular employees. He further opined that Charlie (Cline) was "behind this." (See footnote 3) Grievant concluded that "[a]t no time Lisa told me that shedid not like any of the comments or to stop making them. The time above is the only time I knew she was offended."

Jimmy Riggs, who was unidentified by title but was apparently a co-worker of Grievant's, initially

wrote "I cannot comment on anything Larry Turner did or did not say to or in front of Lisa." He did recollect that he, Mr. Riggs, had upon occasion used some foul language at work but that Ms. Greaser had not complained to him and that he had heard her use similar language. He concluded that he had not heard Grievant say anything of a sexual nature to Ms. Greaser other than something to the effect that "We will have to work our balls off to get this black top off."

Mr. Paletta testified that a DOH Sexual Harassment Policy was distributed to all of the districts and county offices. The policy was accompanied by a cover memorandum which advised the supervisors to either allow the employees to read it or to call a general meeting, read it, and make it known to the employees and have them document that they were present. He stated that the policy was also posted on bulletin boards for the employees' convenience. After completing this investigation, Mr. Paletta took the statements to the District Engineer for review. The matter was then referred to DOH's Legal Division for further action.

On August 23, 1993, Patricia Lawson of the Legal Division interviewed Ms. Greaser, Ms. Miller and Mr. Turner. The statements of the three individual were essentially the sameas those given to Mr. Paletta, with the exception that Grievant unequivocally denied making any comments directed at a female regarding the sex act or the person's body. He repeated several times that "[t]here was no sexual harassment." Interestingly, when asked what he would consider sexual harassment if it happened to his wife, Grievant responded "[w]ell, what I would consider if someone come to her and come on to her or something like that. You know, if someone would come and talk dirty around her and she'd say, hey, I don't want to listen to that, and he persisted, I'd say it was sexual harassment." Grievant also acknowledged that he had seen the sexual harassment policy.

Based upon the foregoing, Respondent argues that Grievant engaged in sexual harassment as defined by its policy to be "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature which has the purpose or effect of unreasonably interfering with an individual's work performance or creating a hostile, intimidating, or offensive working environment." In this case, Respondent argues that Grievant's actions were of such a serious nature that a twenty-day suspension was warranted for a first offense.

Grievant responds that he did not engage in sexual harassment, and, if it is found that he did sexually harass Ms. Greaser, the discipline imposed was inconsistent with that in similar cases and Respondent's progressive disciplinepolicy. Testifying at level four, Grievant characterized his

interaction with Ms. Greaser as "banter" in which she was a willing participant. Grievant admitted to commenting to Ms. Greaser, "I bet you have to have your jeans special made," but stresses that he apologized to her at that time and again the following morning. During that incident he recalled that Ms. Greaser had participated by sticking a finger in his stomach and making a statement regarding its size. Grievant stated that he had never been counseled or reprimanded by a supervisor and had no prior knowledge that Ms. Greaser found his comments offensive.

Grievant lists several reasons why a twenty-day suspension was an excessive measure of discipline. First, he claims that Ms. Greaser engaged in teasing and joking of a sexual nature with him and other employees and that she had also physically touched him upon occasion. Second, Ms. Greaser had complained about other employees who had received only verbal counseling for their behavior. Grievant suggests that Ms. Greaser could, and should, have complained earlier if his behavior was truly offensive to her, as she had the other employees. Her failure to complain earlier left Grievant with the impression that his actions were acceptable.

Third, employees who had displayed "girlie" magazines, calendars and similar types of materials at the workplace were not disciplined. Fourth, the Respondent has a progressive discipline policy and Grievant was not given counseling or areprimand prior to the suspension. Fifth, West Virginia Division of Personnel Administrative Rules, Section 12.05 requires than "[i]n dismissals for cause and other punishments, like penalties shall be imposed for like offenses."

Grievant asserts that it is patently unfair and unreasonable to discipline an employee in a cumulative manner for alleged offenses which occurred over a period of time, without first informing the employee of a need to improve his behavior. The situation is compounded, Grievant argues, because Respondent was made aware of possible problems with his behavior when Ms. Greaser asked to be reassigned to another work crew. Although Ms. Greaser was transferred, Grievant claims that he was not apprised that the change was due to his behavior or that his behavior was in any way unacceptable. Grievant asserts that he first became aware that his behavior was unacceptable when the matter was investigated.

Discussion

Upon due consideration of the record in its entirety, it is determined that Grievant acted in a manner which created a hostile or offensive work environment for Ms. Greaser and possibly other

female employees. The statement Grievant provided to Ms. Lawson during her investigation further indicates that he understood what type of behavior constituted sexual harassment. He clearly stated that if someonepersisted in talking dirty to his wife after she had asked them to stop, that would be sexual harassment. It is incredible that Grievant could not apply that understanding to his own actions. Grievant undeniably acted in a reprehensible manner subject to discipline.

The remaining issue is whether the twenty-day suspension was appropriate in this situation. Based upon the evidence in this case, it must be concluded that the discipline was not excessive. Grievant's relentless commentary toward Ms. Greaser was of such a personal and offensive nature that Respondent reasonably determined that lesser disciplinary measures such as counseling or reprimand would be inadequate.

Respondent's disciplinary policy also does not require the application of progressive discipline in every case. The policy specifically provides that "[t]he type of action taken for an offense depends on the severity of the offense measured by the standards of conduct and the circumstances surrounding the offense." Progressive discipline is generally to be applied in cases of "repeated unexcused offenses or failures, which standing alone do not call for more drastic action." Respondent's determination that Grievant's behavior required more drastic action cannot be characterized as unreasonable.

Further, there is no evidence that the discipline imposed by Respondent is in violation of Personnel Regulation 12.05, in that there is no evidence that any cases similar to this have resulted in lesser penalties. Examples cited by Grievantinvolved complaints of offensive language which were not of a sexual nature, or were matters in which no formal complaint was filed.

The evidence does indicate that the issue of sexual harassment had been given little concern in Preston County. It is undisputed that calendars or other paraphernalia exhibiting females in some degree of undress were present in the workplace. (See footnote 4) Other complaints of sexual harassment may not have been given due consideration, and vulgar language may be commonplace. Jeff Black, Respondent's Director of Human Resources, testified that these factors were considered in determining Grievant's discipline and contributed to the lessening of the punishment from dismissal to the twenty-day suspension. While it is apparent that more stringent application of the sexual harassment policy is required at the county level, absent any showing of disparate treatment in a similar case, this factor alone is inadequate to reverse Respondent's decision.

In addition to the foregoing narration it is appropriate to make the following formal findings of fact and conclusions of law.

FINDINGS OF FACT

1. Grievant is employed by the Division of Highways as a Craftsworker II in Preston County.

2. During the summer of 1993 Grievant persisted in directing comments of a sexual, gender-specific nature to at least two, female temporary employees.

3. At times Grievant also initiated physical contact with the complaining female employee by putting his arm around her or resting his elbow on her shoulder.

4. The female employee told Grievant to stop the offensive behavior on more than one occasion.

5. After an incident in late July or early August in which Grievant made comments to the female employee which resulted in her leaving work in tears, she filed a formal complaint against Grievant.

6. Anthony Paletta, an EEO officer for Respondent, initially conducted an investigation of the matter. He forwarded his findings to Respondent's Legal Division which conducted its own investigation.

7. As a result of the investigations, Grievant was suspended for twenty days.

CONCLUSIONS OF LAW

1. Respondent proved by a preponderance of the evidence that Grievant engaged in behavior which created a hostile, intimidating, or offensive work environment for at least one female employee, a violation of the DOH Sexual Harassment Policy.

2. Although this was the first complaint filed againstGrievant, suspension was not prohibited by Respondent's progressive disciplinary policy which allows a more severe penalty for a first offense of a serious nature.

3. The evidence does not support a finding that the discipline imposed in this matter was inappropriate or that Respondent abused its discretion or acted in an arbitrary and capricious manner when imposing a twenty-day suspension for sexual harassment. See Broughton v. Division of

Highways, Docket No. 92-DOH-325 (Dec. 31, 1992).

4. Grievant failed to prove that Respondent had failed to imposed like penalties for like offenses in violation of Personnel Rule 12.05.

Accordingly, the grievance is DENIED.

DATED 2/28/95 Sue Keller

Senior Admn. Law Judge

Footnote: 1 The grievance was denied at levels one, two, and three.

Footnote: 2Transcript references are to the level two transcript made a part of the level four record.

Footnote: 3The record indicates that Grievant was not on the best of terms with Mr. Cline. Grievant provided one example in which he believed that he had not been fairly treated by the Assistant Superintendent, and there may have been other instances in which the two men did not agree.

Footnote: 4There is no allegation that Grievant was responsible for the presence of any such items.