BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SAUK COUNTY HEALTH CARE CENTER EMPLOYEES UNION, AFSCME LOCAL 3148

and

SAUK COUNTY (HEALTH CARE CENTER)

Case 149
No. 63349
MA-12557

(Michelle Scherbert Termination)

Appearances:

William Moberly, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of Sauk County Health Care Center Employees Union, AFSCME Local 3148.

Todd J. Liebman, Corporation Counsel, on behalf of Sauk County.

ARBITRATION AWARD

Sauk County Health Care Center Employees Union, AFSCME, Local 3148, hereinafter the Union, requested that the Wisconsin Employment Relations Commission provide a panel of staff arbitrators from which the parties select an arbitrator to hear and decide the instant dispute between the Union and Sauk County, hereinafter the County, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. 1/ Thereafter, the County concurred in the request and the parties selected the undersigned, David E. Shaw, who was then designated to arbitrate in the dispute. A hearing was held before the undersigned on June 10, 2004 in Baraboo, Wisconsin. A stenographic transcript was made of the hearing and the parties completed the submission of post-hearing briefs on September 7, 2004.

1/ The parties agreed to waive the contractual time limit for issuance of the award in this matter.

Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties were unable to agree on a statement of the issue and agreed that the Arbitrator will frame the issues to be decided.

The County would state the issues as being:

Did the County have just cause to discharge the grievant; and if not, what is the appropriate remedy?

The Union would state the issues as follows:

Did the County have just cause to terminate the grievant for sexual harassment; if not, what is the appropriate remedy?

The Arbitrator concludes that the Union's statement better states the issues to be decided.

CONTRACT PROVISIONS

The following provisions of the parties' labor agreement are cited, in relevant part:

ARTICLE 3 – MANAGEMENT RIGHTS

3.01 The Employer possesses the sole right to manage and operate its affairs in all respects and retains all such rights it possessed prior to this Agreement which are not expressly modified or superseded by this Agreement. Such rights of the Employer to manage its affairs shall be liberally construed and modified only by the express language of this Agreement. Those management rights include, but are not in any way intended to be limited by, the following:

A) To manage, direct, and control the operation of the work force;

. . .

C) To hire, transfer and promote, and to demote, discipline, and discharge employees for just cause;

D) To make, modify and enforce reasonable rules or regulations and standards of performance applicable to the work force;

. . .

I) To take any action necessary to comply with federal or state requirements applicable to its programs;

. . .

ARTICLE 8 – GRIEVANCE PROCEDURE

8.01 Definition and Steps: A grievance shall mean any dispute concerning the interpretation or application of a provision of this contract, and shall be handled in the following manner:

. . .

8.03 General and Disciplinary Grievances: Grievances involving the general interpretation and application of this agreement may be initiated at Step Two of this procedure, provided it is identified on its face as a general grievance. Discipline, except oral reprimands, shall be imposed only after a write-up conference. Grievances relating to discipline and discharge shall be initiated at Step Two of this procedure.

. . .

BACKGROUND

The County maintains a health care facility, Sauk County Health Care Center (HCC). At the time in question, the Administrator at the HCC was Jill Archambo and the Personnel Manager was Katie Pope. The Grievant was a Certified Nursing Assistant (CNA) at the HCC working on the p.m. shift on the Fifth Floor facility for developmentally disabled, the FDD unit. The Grievant's co-workers on her shift at the time were Becky Althiser, Mandi Drea, Becky Turner, Jeni Krayer and J.S. J.S. is the only male CNA on the staff in the FDD unit. Debra Muchow is the Program Services Director at HCC and the supervisor of the staff on the FDD unit.

This matter involves a statement the Grievant made on October 23, 2003. There is a dispute as to what the Grievant said, and some dispute as to when and where she said it. The Grievant, Drea, Althiser and Krayer were leaving work at the end of their shift at

approximately 11:00 p.m. Drea's written statement and her testimony was that the Grievant made the statement when they were walking down the hallway to check out. Krayer's statement indicated they were in the hallway by the time clock. Althiser and the Grievant testified that they had already checked out and were heading for the door.

The testimony most significantly differs as to the Grievant's statement. The Grievant testified that she said she had seen J.S. looking down her shirt, and that when Drea started to get upset, she said she was "just kidding", because she did not want Drea to blow it out of proportion. The Grievant further testified she was not, in fact, kidding.

Drea testified that the Grievant said J.S. looks down their shirts, in a way that led them to believe it was true and then said she was "just kidding". In her statement given to Pope and Muchow, Drea told them that the Grievant had said "You know he looks down your shirt Mandi", and did not say it as if joking, and that Grievant then said he did it to the others too. At the end, the Grievant said "Oh, I'm just kidding."

Althiser testified that the Grievant said J.S. was looking down Drea's shirt and then as they were leaving, said he was looking at their "asses" when they bent over and that they should watch out because he looks down their shirts too. Then she said, "Oh, just kidding." In her statement to Pope and Muchow, Althiser first stated the Grievant said J.S. looks down Drea's and her shirts and then said the others too. She also stated the Grievant said J.S. was looking down their shirts when they bent over and that they better not bend over because he'll look at your asses, too. The Grievant's tone was serious, but she ended by saying, "I'm just kidding."

Krayer did not testify, but in her statement to Pope and Muchow stated the Grievant said that J.S. looks down their shirts and to watch it when they bend over because he looks at their butts, too. Krayer said the Grievant included everyone at first, but then focused on Drea. The Grievant's tone was serious, but as Drea was getting more "worked up", she said she was just kidding.

The Union's Chief Steward, Kari Olstadt, testified that she talked to Drea, Althiser and J.S., individually, and that all of them told her that the Grievant had accused J.S. of looking down the Grievant's blouse.

There is also some dispute as to what subsequently occurred. According to J.S., he worked with the Grievant the next day and during a break, she told him how they like to get Drea going and that she told Drea that J.S. had looked down her shirt, and that Drea would be upset with him when they worked on Saturday. The Grievant denies she said anything to J.S. about it. J.S. testified that Drea brought it up the next day when they were working together when she asked him if he knew what the Grievant had said about him. J.S. responded that he

did and asked Drea if she believed it. J.S. testified Drea said she did not believe it about him. J.S. further testified that he was upset about what the Grievant had said and was afraid the others might believe it was true, when it was not, and felt intimidated by it. Several days later he was encouraged by Althiser, Krayer and Turner to report it to Muchow.

J.S. subsequently went to Muchow and reported what he understood the Grievant to have said about him and that he was upset about the false accusations. Muchow said they had to talk to Pope and the both of them then went to Pope's office. According to J.S., he was upset and crying when he talked to Pope and Muchow. Pope reported the matter to Archambo and to the County Personnel Director, Michelle Koehler. Pope and Muchow then called in the individuals to whom J.S. had said the Grievant made the statement, Althiser, Drea, and Krayer, and asked them a set of questions. Each was placed in a separate room and interviewed separately. Turner was similarly interviewed by Muchow the next day (October 30, 2003). Drea and Althiser indicated that they did not know if they believed the Grievant or not at first, but after thinking about it, decided J.S. would not do that. Krayer indicated she did not believe it.

According to Pope, she then reviewed the Grievant's personnel file and found that the Grievant had been terminated on November 15, 2002 for allegedly twice grabbing a male co-worker by his genitals. 2/ That termination had been grieved and following a grievance hearing with Archambo, Archambo had sent the Union's representative, Bill Moberly, a letter of November 27, 2002, which stated, in relevant part:

2/ In the space for the employee's response on the termination letter, the Grievant denied it had occurred.

> After some further discussion, the Union concurred that inappropriate touching, sexual comments, jokes, etc. are unacceptable in the workplace. The Union asked Management to consider the employment history of the grievant and proposed:
>
> Reducing the termination to an unpaid suspension with the time away considered as the suspension. Make returning to work conditional upon the grievant successfully receiving training on sexual conduct and relations in the workplace and then being required to conduct harassment training for coworkers.
>
> After carefully reviewing all of the related information, including the personnel file, which shows no disciplines issued since September of 2001, Management is willing to propose:

1. Michelle Scherbert may return to work as soon as can be arranged in her former position and pay grade.

2. As a condition of her returning to work, Michelle is required to attend harassment/sexual conduct training of Management's choosing within the first 90 days back on the job.

3. After completion of this training, Michelle will be required to conduct training for CNA staff per Management's scheduling of such sessions within the next six months. The training will be done at least two times.

4. Should Management receive and be able to reasonably substantiate any related type of complaint regarding Michelle's work conduct within the next twelve months, the union agrees to not pursue any termination related grievance past the third step review.

This agreement is not intended to establish any remedy procedure for future grievances that may be filed.

Please inform me as soon as possible of your acceptance or rejection of this proposal.

Sincerely,

Jill M. Archambo /s/
Jill M. Archambo, NHA
Administrator

By e-mail of December 13, 2002 to Archambo, Moberly accepted the County's proposed settlement of the grievance.

After considering the statements of Drea, Althiser, Krayer and Turner, the County's and the HCC's personnel policies, the County's sexual harassment policy and the resolution of the Grievant's prior termination, Archambo, Koehler, Pope and Muchow decided that the Grievant should be terminated, and Pope drafted a termination letter to be given to the Grievant at a meeting on October 31, 2003. The Grievant had taken time off and was not at work from the time J.S. reported the matter until October 31st.

Pope called the Grievant and told her to come to a meeting on October 31st. According to the Grievant, Pope would not tell her what the meeting was about, saying it was

confidential. The Grievant and Union President Joyce Fears met with Pope and Muchow, at which time Pope gave the Grievant a letter notifying her she was being terminated and a brief statement as to what management believed had occurred. The Grievant was asked to sign the letter and to respond, which she did in writing in the space provided on the letter. The letter and the Grievant's response read as follows:

> RE: Notice of Employment Termination
>
> Dear Ms. Scherbert:
>
> A complaint has been received by this facility regarding statements made by yourself to 3 of your female coworkers while on work premises. The complaint alleges that you made statements to 3 of your female coworkers stating that one of your male coworkers was behaving in an inappropriate sexual manner toward the 3 female employees while on work premises. These statements made by yourself to your 3 female coworkers reportedly took place between the 2 West hallway and the exit doors near the Maintenance Shop around 11:00 p.m. Your actions were witnessed and through an investigation were confirmed and verified by three coworkers. In addition, the allegations made by yourself against your male coworker were found to be unsubstantiated after a complete investigation.
>
> The allegations made by you against your male coworker were not only personally offensive and debilitating to his morale but created an intimidating work environment for him, causing his effectiveness and work performance to be negatively effected.
>
> As you are aware, Sauk County is committed to maintaining a work environment free of inappropriate and disrespectful conduct and communication of a sexual nature, as stated in Sauk County's Sexual Harassment Policy Statement. In addition, Sauk County Health care Center's Personnel Policies, Discipline section clearly states in part, "Employees will not engage in immoral conduct in or around their place of work or on Center property. . .Employees will not engage in any activity endangering the safety and/or welfare of a resident, fellow employee, or visitor. . .Employees will not be guilty of sexual harassment in any form at any time." The policy goes on to state, "Violation of the rules, and others that may be implemented from time to time, will result in disciplinary action and be viewed as WILLFUL MISCONDUCT, as defined in State Statutes." Your actions, as reported and confirmed by coworkers is in complete and direct opposition of the very reasonable and common standards set forth by the Sauk County Sexual Harassment Policy Statement and the Sauk County Health Care Center Personnel Policies.

In accordance with the Sauk County Sexual Harassment Policy Statement, the Sauk County Health Care Center Personnel Policies, along with consideration and review of an investigation of similar nature conducted in November, 2002, after careful consideration a decision has been made to terminate your employment with the Sauk County Health Care Center effective today, October 31, 2003.

Your final paycheck will be mailed to you at the above stated address. Please notify the Personnel office in writing of any personal items you may have stored on facility premises. They will also be mailed to you.

Katie Pope/s/	10/31/03	Debra Muchow /s/	10/31/03
Personnel Manager	Date	Program Services Director	Date

I acknowledge that I have been informed of the above incident and received a copy of this notice.

Michelle Scherbert /s/	10-31-03	JoyceFears,Union President /s/	10/31/03
Employee Signature	Date	Union Representative Signature	Date

Employee Response: At the time of the alleged incident I was punched out and outside of building. I don't feel I said anything inappropriate towards this. And I don't feel that I have caused an intimidating workplace.

Muchow testified the Grievant was given the opportunity to respond, but chose to do so in writing. The Grievant testified that Pope said it was about something she had said, but was not specific, and that Pope and Muchow did not ask her any questions about it. Pope testified that the Grievant was asked to give a response in writing.

The County's Personnel Policy on "Sexual Harassment" includes the following, in relevant part:

> *Policy*
>
> . . .
>
> ***All employees have a right to work in an environment free from discrimination and harassing conduct, including sexual harassment. Harassment on the basis of an employee's race, color, creed, ancestry, national origin, age, disability, sex, marital status or sexual orientation is expressly prohibited under this policy. Harassment on any of these bases is also illegal under Section 111.31-111.39, Wisconsin Statutes.***

This policy applies to all existing and new employees.

. . .

Definitions

Harassment means persistent and unwelcome conduct or actions on any of the bases defined above. Sexual harassment is one type of harassment and includes unwelcome sexual advances, unwelcome physical contact of a sexual nature or unwelcome verbal or physical conduct of a sexual nature.

Unwelcome verbal or physical conduct of a sexual nature includes, but is not limited to:

- ***The repeated making of unsolicited, inappropriate gestures or comments;***
- ***The display of offensive sexually graphic materials not related to our work.***

<u>Harassment on any basis (race, sex, age, disability, etc.) Exists whenever</u>:

- ***Submission to harassing conduct is made, either explicitly or implicitly, a term or condition of individual's employment;***
- ***Submission to or rejection of such conduct is used as the basis for an employment decision affecting an individual;***
- ***The conduct interferes with an employee's work or creates an intimidating, hostile or offensive work environment.***

. . .

A grievance was filed regarding the termination. The Union's Chief Steward, Kari Olstadt, testified that she asked Pope for the names of the other employees involved and was told that was confidential. Olstadt testified that Union President Fears told her that the Grievant had been fired for sexual harassment of a co-worker, in that she had accused a co-worker of looking down her blouse. Olstadt also testified that the usual procedure at the HCC

regarding the termination of an employee is to give the employee the notice of termination and have them respond in writing. According to Olstadt, employees are given the opportunity to give their side of the story in the grievance meeting, which occurred at the Step 2 meeting in this case.

A Step 2 meeting was held on November 13, 2003 with the Grievant, Moberly, Olstadt, Archambo, Pope and Muchow present. The Union was given the statements of Althiser, Drea, Krayer, Turner and J.S., however, their names were deleted from the statements. The Union requested the identities of the employees who gave the statements, but the County refused to provide that information. 3/ A heated discussion occurred as to whether the statements were sexual in nature. The Grievant testified that she was instructed by Moberly not to say anything at the meeting.

3/ Olstadt testified that she subsequently did talk to Althiser, Drea and J.S., individually.

A Step 3 grievance meeting was held on December 12, 2003, with the Union presenting the Grievant's position to the County's Personnel Committee. The grievance was denied at Step 3 and the parties proceeded to arbitrate the dispute before the undersigned.

POSITIONS OF THE PARTIES

County

The County takes the position that it has met its burden of proving that the discharge of the Grievant satisfies the seven tests for determining just cause. ENTERPRISE WIRE CO., 46 LA 359 (Daugherty, 1966). Just cause is satisfied where the employer shows that the employee engaged in wrongdoing and that the discharge was appropriate under all relevant circumstances. Proof by a preponderance of the evidence is sufficient for the employer to carry its burden. WHOLESALE PRODUCE, 101 LA 1101 at 1104 (Bognanno, 1993). Section 3.01(D) of the parties' agreement expressly authorizes the County to make reasonable rules or regulations. Section 3.01 further provides that the "rights of the Employer to manage its affairs shall be liberally construed" and may only be modified by the express language of the agreement. The Grievant's case, when analyzed in connection with the seven questions of the DAUGHERTY standard, clearly illustrates that the County has established just cause to discharge the Grievant by a preponderance of the evidence.

With regard to whether the employee was given advance warning of the possible disciplinary consequences of her conduct, there is no reasonable doubt that the Grievant knew, or should have known, of the consequences of her conduct. She had been terminated

previously for sexual harassment when she grabbed a male co-worker's genitals. She was reinstated on the condition that any further misconduct would result in discharge and was required to attend sexual harassment training, which she completed. That training expressly included iteration of what constitutes a "hostile work environment": unwelcome sexual behavior that creates a hostile or intimidating workplace, that negatively affects a person's ability to do their work." That training also indicated that employees would be held accountable for avoiding the prohibited conduct. Further, the Grievant had received and signed the HCC Personnel Policies adopted pursuant to Section 3.01(D) of the agreement. Those personnel policies include, in relevant part that "Employees will not be guilty of sexual harassment in any form at any time."

This rule is reasonably related to the efficient and safe operation of the County's business. The County has no choice but to regulate conduct that is disruptive to the workplace. Further, sexual harassment is a violation of State and Federal law and the County has no choice but to enforce those laws. Section 111.32(13), Wis. Stats., defines sexual harassment, in relevant part, as follows:

> "(13) "Sexual harassment" means unwelcome sexual advances, unwelcome requests for sexual favors, or unwelcome physical contact of a sexual nature.'. . .Unwelcome verbal or physical conduct of a sexual nature" includes but is not limited to. . .deliberate verbal . . .conduct of a sexual nature. . .that is sufficiently severe to interfere substantially with an employee's work performance or to crate an intimidating, hostile or offensive work environment."

Equally significant is the fact that the Grievant's conduct created a disruption in the workplace. J.S. was extremely upset, and the County owes him a special duty, as he is the only male working in his unit. Her conduct not only violated County policy and any reasonable expectation of behavior in the workplace, but could also constitute the County condoning a hostile work environment, and thus, sexual harassment under State law.

The County asserts that before they administered discipline, an effort was made to discover whether the Grievant did, in fact, violate a rule or order of management. Witnesses were interviewed separately, and prior to the administration of the discipline, the Grievant was offered an opportunity to present any facts she wanted considered. However, she decided to simply write a comment on her letter of termination that did not deny the offense, but essentially asserted that the conduct was not intimidating. While the Grievant was not interviewed during the investigation, she had ample opportunity to present her side of the story when presented with the termination letter.

The County asserts that the investigation was conducted fairly and objectively. The Grievant was not working during that time, but the three witnesses to her statement, Althiser, Drea and Krayer were working, and each were interviewed separately and asked the same series of open-ended questions. The statement of these witnesses, however, were virtually identical.

The investigation produced substantial evidence that the Grievant was guilty as charged. There is no reasonable question regarding what really happened. While the Grievant changed her story, alleging that she had said that J.S. was looking down her top, rather than Drea's, the testimony of the other witnesses contradict that story. The question then is whether the preponderance of the evidence supports the Grievant or the other witnesses. The evidence shows that the County's witnesses have no reason to fabricate their testimony.

As to whether the County applied its rules and penalties without discrimination, even the Union does not allege a motive on the part of J.S. or discrimination in the application of the rules in this case. The County was very magnanimous in allowing the Grievant to return to work after previously grabbing a male co-worker's genitals. The County could not sanction another significant incident by the Grievant in less than a year. In fact, the County had informed the Grievant that a further incident could result in termination. Management acted in the only way that it reasonably could in deciding to terminate the Grievant.

As to the last question, i.e., whether the degree of discipline imposed reasonably related to the seriousness of the offense and the employee's record of service, the Grievant's offense is serious when considered in the context of the working situation. The HCC is a skilled nursing facility, and the FDD unit cares for severely disabled individuals. The focus of employees needs to be on patient care. J.S. is the only male employee on the unit. A rumor alleging misconduct on the part of J.S. could seriously disrupt the workplace and compromise his ability to work. Both by law and virtue of being a responsible employer, the County has an absolute obligation to maintain a workplace that is free from sexual harassment, including a hostile work environment. The County had little real choice but to discharge the Grievant. As to the Grievant's record of service, she had previously been terminated for the incident involving grabbing a male employee's genitals, and was allowed to come back to work under the express condition that no further incidents take place.

The County asserts that the Grievant's explanation is a new fabrication. The Grievant changed her story for the arbitration hearing, pretending to be an altruistic co-worker, warning her colleagues about the prurient conduct of a fellow co-worker. However, the Union's position at Steps 2 and 3 of the grievance procedure was that the Grievant was simply joking and that management were "Victorian prudes." Further, the Grievant's story does not square with the testimony of Althiser, Drea and J.S., who the Grievant acknowledges had no reason to fabricate.

Last, the County asserts that the grievance should be denied where the Union has broken its agreement in the Grievant's last chance agreement not to advance the grievance beyond Step 3. The Union expressly accepted these terms in total by the e-mail of December 13, 2002. The Grievant's conduct in this case is a "related type of complaint", as it is again a problem with a male co-worker and the Grievant having engaged in inappropriate sexually-related conduct in the workplace. While the merits of the case clearly support termination, this ground alone should be sufficient to support dismissal of the grievance.

In its reply brief, the County asserts that the Union essentially makes two arguments: (1) that the investigation was flawed because the Grievant was not initially interviewed as part of the initial investigation; and (2) that the Grievant cannot be disciplined because her conduct did not constitute "sexual harassment".

With regard to the Union's first argument, it appears that its sole disagreement with the investigation is that the Grievant was not interviewed. Even if the Union's argument is accepted, it does not render the discharge without just cause where the Grievant was given the opportunity to present her side of the story at the termination meeting, and subsequently at Steps 2 and 3 of the grievance procedure. It is not the County's fault that the Union failed to avail itself of these opportunities on behalf of the Grievant. At the termination hearing, the Grievant had the opportunity to present any facts and circumstances she believed were relevant; however, she did not deny the allegations nor advance the story that J.S. was looking down her shirt. At the Step 2 grievance hearing, rather than relating the Grievant's story as presented in arbitration, the Union chose to argue that looking down a woman's blouse or at their rear end is not sexual. Having failed to exhaust its administrative opportunities to present the Grievant's side of the story to management, the Union cannot now argue that the Grievant did not have that opportunity.

Regarding the argument that the Grievant's conduct does not constitute sexual harassment, the conduct created a hostile work environment and violated the HCC policies. State statutes recognize the toleration of a hostile work environment as a basis for a claim of sexual harassment. The County could not tolerate the Grievant's conduct without incurring liability for permitting a hostile work environment. Further, the County has the right to make reasonable work rules and has made rules with regard to sexual harassment. Where the conduct constitutes sexual harassment under County policies and training, it constitutes a rule violation and therefore discharge is appropriate. The Grievant received and signed the HCC personnel policies which include sexual harassment as a basis for discipline. While the nuances of State and Federal law may be debated, the Grievant was placed on notice that the conduct was prohibited, and received training on what constituted that conduct and violated the rule. Therefore, the County had just cause to discharge the Grievant, especially in view of her past work record.

The County concludes that the Union's arguments fail to refute the County's case that it had just cause to terminate the Grievant. When viewed in the context of the Grievant's previous discharge and reinstatement, discharge in this case is the appropriate level of discipline.

Union

The Union takes the position that the County did not have just cause to discharge the Grievant.

In support of its position, the Union first asserts that the County did not give the Grievant due process, and that its investigation was seriously flawed. The County failed to interview the Grievant or allow her to tell her side of the story prior to making the decision to terminate her employment. "To satisfy industrial due process, an employee must be given an adequate opportunity to present his or her side of the case before being discharged by the employer. If the employee has not been given such an opportunity, arbitrators will often refuse to sustain the discharge or discipline assessed against the employee. . . ." Elkouri and Elkouri, *How Arbitration Works*, Sixth Edition, page 967.

It is clear from the testimony of Pope and Muchow that the management of HCC failed in their obligation to conduct a thorough investigation prior to making the decision to terminate the Grievant. While they interviewed witnesses, they never asked the Grievant for her side of the story, nor did they inquire about the alleged sexual harassment by J.S. that the Grievant reported to her co-workers. Pope testified that the statements taken from the three co-employees, as well as J.S.'s statement, the Grievant's prior termination and County policies constituted the complete investigation. Pope's testimony indicates that neither she, nor Muchow, nor Archambo, ever took the time to ask the Grievant a single question about the incident. Further, they never conducted an investigation to determine whether or not J.S. was responsible for the conduct of which he was accused. Similarly, Muchow's testimony supports the contention that HCC failed to provide the Grievant due process. Muchow acknowledged that the Grievant was not interviewed regarding the allegations prior to the October 31st meeting at which she was terminated. Muchow conceded that the Grievant had been given the termination letter prior to being given the opportunity to respond to the letter.

The County also failed repeatedly to tell the Grievant the specifics of the accusations, making it impossible to adequately respond. The termination letter never advised the Grievant of the allegation of which she was accused. Prior to the second step grievance meeting, the Union requested information from management regarding the specifics of the Grievant's termination in order to allow both the Grievant and the Union an opportunity to fully prepare a response. Archambo denied the Union's request and continued to deny the Union the information regarding the identity of the employees making the accusations against the

Grievant, severely hampering the Union's ability to properly investigate the matter. The Union's request for the names of those employees was denied until the day of the arbitration hearing.

The Union denies that the Grievant's actions constituted sexual harassment. The Union cites the County's sexual harassment policy which includes the definition of harassment. The Grievant's comments were made to three female co-workers advising them of what the Grievant perceived as a legitimate concern. The Grievant never made the comments to J.S., rather it was Drea who told J.S. about the Grievant's concerns. Drea assured J.S. she did not believe that he would look down their blouse and Althiser, Drea and Krayer all told management during the investigation that they did not believe the accusations against J.S. The Grievant simply reported her concerns to three female co-workers. That does not rise to the level of sexual harassment. If every time an employee reported a situation that they believed may be sexually inappropriate, the employee was fired, no one would report sexual harassment for fear of losing their job.

The policy refers to harassment as being persistent and repeated. The Grievant made one statement on one day to one group of co-workers and never repeated her concerns again. The policy also refers to harassment as creating a hostile work environment. Yet, Althiser, Drea and Krayer all said they did not believe the Grievant's accusations against J.S. There is nothing in the record to suggest that the work environment has become hostile towards J.S. since the incident.

While sexual harassment can include a worker making sexual comments about a co-worker to others in the workplace, for the Grievant to warn her female co-workers that a male co-worker is looking down their blouse when they bend over, can in no way be interpreted as sexual harassment.

The Union concludes that the Grievant's comments to her co-workers did not constitute sexual harassment as they were not sexual, they were not repeated or persistent, and they did not create a hostile work environment. Further, management failed to conduct an adequate investigation and failed to provide the Union with the necessary information to allow it to do an adequate investigation, and never advised the Grievant as to why she was being terminated. Thus, the County did not show just cause to terminate the Grievant and the Union requests that the Grievant be reinstated to her previous position with full back pay and all rights and benefits she would have enjoyed had she not been unjustly terminated.

DISCUSSION

Ordinarily, application of the just cause standard involves the determination of two questions: (1) Did the employee engage in the conduct alleged, and is it conduct in which the

employee has a disciplinary interest, and, if so, (2) whether the level of discipline imposed is reasonable in light of the conduct and the relevant circumstances. In this case, however, the parties entered into a "last chance" agreement with regard to the Grievant's continued employment at the HCC based upon events that occurred in the Fall of 2002 when she was terminated for allegedly grabbing a male co-worker by his genitals. As part of their agreement to reinstate the Grievant, the parties agreed to the following provision:

> 4. Should Management receive and be able to reasonably substantiate any related type of complaint regarding Michelle's work conduct within the next twelve months, the union agrees to not pursue any termination related grievance past the third step review.

Given the last chance agreement, if the Grievant's comments are found to be conduct related to the type of alleged misconduct in 2002, i.e., sexual harassment, the parties have essentially answered the second question.

The Union also raises the issue of whether the Grievant's termination should be overturned on the basis that she was denied procedural due process. There are three prongs to the Union's argument: (1) That the Grievant was not afforded the opportunity to give her side of the story as to what occurred before she was terminated, and therefore the County failed to fairly investigate the matter; (2) that the Grievant was not given the specifics as to why she was terminated until later in the grievance procedure; and (3) that the Union and the Grievant were denied the names of her accusers, thus impairing their ability to defend against the accusation. Of the three, there is only merit to the first.

Regardless of the Union's claims, the record indicates that the termination letter was sufficient to give the Grievant notice of the specific accusations against her. It noted the time, location and circumstances and the Grievant apparently felt she could respond, as she did so on the bottom of the letter. As the Grievant was aware of who was present when she made the alleged statement, she knew the identity of those employees who gave the statement to management. This is further evidenced by the fact that even though management would not give the Union those employee's names, the Union's Steward, Olstadt, was able to identify them and talk to them about the matter. Thus, although management's refusal to give the Union that information was inappropriate, it did not in fact impair the Union's ability to fully investigate the matter.

More troubling is the failure to give the Grievant an opportunity to tell her side of the story before being terminated. It is apparent from the testimony of Pope and Muchow that the decision to terminate the Grievant was made before they met with her on October 31st to give her the termination letter. However, it is also apparent that, given the concurring statements of the employees involved, Archambo, Pope and Muchow were not going to change their

conclusions as to what had occurred regardless of what the Grievant had to say. With the exception of not interviewing the Grievant, the Arbitrator finds management's investigation to have been fair and reasonably thorough. After J.S. brought the Grievant's statement to Muchow's and Pope's attention, they separately interviewed the employees who had been present when the Grievant made her statements, and the questions asked of those employees were not phrased to suggest the answers. It is also noted that the Grievant was given the opportunity to respond to the accusations at the October 31st meeting, albeit after she was given the termination letter, as well as at the Step 2 and Step 3 meetings with management on her grievance. It appears, however, that at least at the Step 2 meeting, the Grievant was told by her Union representative not to say anything. Given all the circumstances, the Arbitrator does not find the failure to interview the Grievant before management made the decision to terminate her a sufficient basis, in and of itself, to overturn the decision.

Turning to the question of whether the Grievant engaged in the conduct alleged, the statements and testimony of Althiser, Drea, Krayer and J.S. are credited over the Grievant's testimony as to what occurred, as well as Olstadt's. There is no evidence in the record to indicate that any of these employees had a motive to be anything other than truthful in this regard. It appears they were all on a friendly basis with the Grievant at the time and the Grievant conceded she had felt that was the case. Although interviewed separately, their statements were consistent as to what the Grievant said, i.e., that the Grievant stated that J.S. looks down their shirts and at their posteriors, rather than stating that J.S. looked down the Grievant's shirt, as she now claims. There is also no apparent reason for J.S. to lie about whether a conversation occurred with the Grievant the next day (Friday) in which the Grievant told him what she had said to Drea. It is apparent from the testimony of both Drea and J.S. that J.S. was aware of what the Grievant had said about him when J.S. worked with Drea on Saturday. There is no other explanation in the record of how J.S. would have known that, if the Grievant had not told him of it when they worked together the previous day.

Arbitrators are not omnipotent. The best they can do is to look at the record evidence, look for consistency in the testimony, consider the motives of the witnesses and, after weighing these factors, reach a conclusion. In this case, in order to credit the Grievant and Olstadt, the Arbitrator would have to find that there was a grand conspiracy among all of these employees to lie about what occurred in order to have the Grievant fired. As previously noted, there is no evidence in the record that would suggest that is the case, let alone support such a finding.

Last, the Grievant's statement to her co-workers that J.S. looks down their shirts and at their posteriors when they bend over is deemed to be sexual harassment. The statements allege that J.S. engaged in inappropriate conduct of a sexual nature in the workplace. It is unlikely there would be any dispute in this regard if the genders were reversed, e.g., a male employee making a statement that a female co-worker was staring at her male co-worker's groin area. Further, the Grievant's statements contributed to a hostile work environment for J.S., as the

only male employee on the FDD unit. That he continued to do his job despite his unease, and that ultimately his female co-workers did not believe the Grievant's statement, do not alter this.

The Grievant attempts to explain her statements by claiming that they were true and that she was trying to warn her co-workers about it. The problem with the Grievant's explanation is, as the County points out, that she did not make such a claim previously. The November 14, 2003 letter from Archambo to the Union's representative following the Step 2 meeting on the grievance indicates that the Union's position at that meeting was that the Grievant had been joking when she made the statements about J.S., as she had said, or that she could have said it because it was true. If it were the latter, the Grievant's statement would not have been an appropriate basis for discipline, and one would believe that the Grievant would have made that claim at her first opportunity. Given that the Grievant waited until the arbitration hearing to make this claim, it lacks any plausibility at this point.

It is concluded that the Grievant's statements regarding J.S. constituted sexual harassment and were sufficiently related to the type of conduct for which she was previously terminated so as to be covered by the terms of the last chance agreement. That being the case, by the terms of that agreement, the County had just cause to terminate the Grievant.

Based upon the foregoing, the evidence, and the arguments of the parties, the Arbitrator makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 22nd day of November, 2004.

David E. Shaw /s/
David E. Shaw, Arbitrator

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