

cl 11/26/03

Decision # 850

IN THE MATTER OF THE ARBITRATION BETWEEN
OHIO DEPARTMENT OF PUBLIC SAFETY
-AND-
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION AFSCME LOCAL 11

Appearing for the Department of Public Safety

Cassandra Brewster, Sergeant OHP
Amy Tait, Labor Relations Specialist-OCB
Reggie Lumpkins, Lieutenant
Renee Byers, Attorney DPS
Brook Zavala, Witness
Joe Berkermer, Deputy Registrar

Appearing for OCSEA

Loyella Jeter, Steward
Terry James, Grievant
William A. Anthony, OCSEA
Michelle Black-Hosang, DX1
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Arlyne F. Gilkey, DXSS
Diana Sterling, Clerk
Jill Hartsell, Clerk
Erma Sommerville, Dietary Aide
John Slack, DX (Driver License Examiner)

CASE-SPECIFIC DATA

Grievance No.

Grievance No. No. 15-00-030610-0080-01-09

Hearing Held

September 23, 2003

Case Decided

November 25, 2003

Subject

Failure of Good Behavior-Hostile Environment Sexual harassment

The Award

Grievance DENIED

Arbitrator: Robert Brookins, Professor of Law, J.D., Ph.D.

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I. The Proceedings

The parties to this dispute are the Ohio Department of Public Safety ("The Agency") and the Ohio Civil Service Employees Association ("OCSEA" or "The Union"),¹ which represents Mr. Terry L. James ("The Grievant"). The Ohio State Highway Patrol launched an administrative investigation on April 7, 2003 in response to charges that the Grievant had violated the Agency's Standards of Employee Conduct.² On May 27, 2003, the Grievant was notified that the Agency intended to terminate his employment due to his "failure of good behavior" and that a pre-disciplinary hearing was scheduled for June 3, 2003.³ On June 4, 2003 the Pre-disciplinary Hearing Officer submitted his report, finding just cause for discipline. On June 4, 2003, the Agency informed the Grievant that his employment was terminated for having violated Rule 501.01 (C)(10) (D)--Failure of Good Behavior. On June 6, 2003 the Union filed grievance No. 15-00-030610-0080-01-09, alleging that the Grievant's discharge violated Articles 2 and 24 of Collective-Bargaining Agreement.⁴ On June 27, 2003, the parties opted to skip the mediation phase of their negotiated grievance procedure and proceed to Step 5.⁵ On August 22, 2003, the Ohio Department of Job and Family Services determined that the evidence presented to that Department did not justify the Grievant's discharge.⁶

On September 23, 2003, the Undersigned presided over an arbitral hearing in this dispute. At that hearing, the Parties agreed that the dispute was free of procedural issues and was properly before the Undersigned. Both Parties were duly represented by their advocates throughout the hearing. The Parties made opening statements and introduced documentary and testimonial evidence. All documentary evidence was available for proper and relevant challenges, and all witnesses were duly sworn and subjected to both direct and cross-examination. The Grievant was present throughout the proceedings and testified in his own

¹ Collectively referred to as "The Parties."

² Joint Exhibit No. 4, at 6.

³ Joint Exhibit No. 3A.

⁴ Joint Exhibit No. 2.

⁵ *Id*

⁶ Union Exhibit No. 1.

1 behalf. The Parties elected to submit Post-hearing Briefs, which were to be postmarked by October 15, 2003.
2 The Briefs were e-mailed to the Undersigned on that date, and the arbitral record was officially closed.

3 II. The Facts

4 The Grievant was employed in the Great Western Driver's Examination Station as a Drivers License
5 Examiner I and had approximately thirteen years of tenure with the State when he was terminated on June
6 4, 2003 for violating Rule 501.01(10)(B) of the Agency's Standards of Employee Conduct, "Failure of Good
7 Behavior." Specifically, the Grievant was removed for directing sexual comments and other types of
8 nonverbal sexual conduct--hostile environment sexual harassment--toward Ms. Brooke Zavala, a former
9 Deputy Registrar employee who was stationed at the Westside License Agency ("WLA"). The Great
10 Western Driver's Examination Station and the Westside License Agency share the same building.

11 When the Grievant was removed, Ms. Zavala had been employed with WLA for approximately six
12 months and had previously worked for WLA on two other separate occasions. On one occasion, Ms. Zavala
13 left the agency to relocate to Atlanta Georgia with her husband, but she subsequently returned to the Ohio
14 area and was rehired by WLA. On a second occasion, Ms. Zavala quit her job extemporaneously after
15 becoming outraged by continual racist/ethnic slurs from customers and fellow employees about Blacks and
16 Mexicans; Ms. Zavala's husband is a Mexican-American.

17 During Ms. Zavala's six-months employment with WLA, she often took smoking breaks outside the
18 rear of the building, while the Grievant oftentimes happened to be taking his smoking breaks. Ms. Zavala
19 took her smoking breaks in the rear of the building rather than in front in order to avoid the frequent stream
20 of questions from customers.

21 Ms. Zavala testified that she could recall only some of the Grievant's sexual statements and conduct
22 because there were so many episodes between September 2002 and April 2003. According to Ms. Zavala,
23 the Grievant first made a sexual comment to her during a smoking break in September 2002. From then until
24 April 2003, the Grievant allegedly bombarded Ms. Zavala with almost daily unwelcomed and offensive

1 sexual comments, innuendoes, and facial expressions. The first sexual comment was made during a
2 conversation the Grievant and Ms. Zavala were having about breast-feeding her infant. Ms. Zavala
3 mentioned that she would telephone the nursery to check on her infant who was being weaned from breast-
4 feeding. The Grievant inquired further about the breast-feeding, and Ms. Zavala indulged him with a detailed
5 explanation of her experiences in that regard. At some point in their conversation, the Grievant allegedly
6 said something to the effect of, "Well, that's one lucky baby; if I got latched on, I'd never get off."

7 Ms. Zavala said that she was astonished by that unvarnished sexual comment, during what she
8 thought was a civilized conversation about a serious subject. She had mistakenly thought such comments
9 were beneath a professional employee like the Grievant.¹⁷ On another occasion the Grievant allegedly based
10 his sexual comments on Ms. Zavala four children, stating that she must "wear her husband out," presumably
11 alluding to the frequency of sexual activity between Ms. Zavala and her husband.

12 The Grievant also voiced frequent, gratuitous complements about Ms. Zavala's attire, using his
13 expression and tone of voice to impart a sharp sexual edge to the comments. Sometimes Ms. Zavala tried
14 to act as if the comments did not bother her; other times she responded by rolling her eyes with an expression
15 of disgust or annoyance. In any event, the Grievant persisted.

16 Eventually, the Grievant focused his attention on Ms. Zavala's breasts and nipples and frequently
17 subjecting her to sexually-laced comments, stares, facial expressions, and teeth-sucking sounds. For
18 example, while they were on a smoking break one cold day, the Grievant said that Ms. Zavala's sweater was
19 too thin as he stared at her nipples that were hard and erect from the cold air. On another occasion, as they
20 took a wintry smoking break, Ms. Zavala stated she was cold and, staring at her hardened nipples, the
21 Grievant responded along the line of, "yeah, I see."¹⁸

22 Persistent comments of this genre by the Grievant eventually forced Ms. Zavala to wear loosely

¹⁷ Joint Exhibit No. 7, at 3.

¹⁸ Joint Exhibit No. 4, at 2.

1 fitting or heavy fabrics and padded bras in an effort to conceal her breast and nipples and stem the relentless
2 wave of lewd gazes and comments from the Grievant. The Grievant's fixation on Ms. Zavala's breasts and
3 nipples became so intense and aggressive that on one occasion he pulled the front of her sweater aside to gain
4 a better view of her breasts⁹ and then commented "those damn sweaters."

5 Finally, in an effort to stop the comments, in January or February 2003, Ms. Zavala approached the
6 Grievant as he sat in his truck in the back of the building taking a smoking break. After she declined the
7 Grievant's invitation to join him, Ms. Zavala informed the Grievant that his comments made her
8 uncomfortable, whereupon he advised her not to take his comments seriously. He mentioned that the Agency
9 had previously fired him for sexually harassing another female employee and that Ms. Zavala should consider
10 herself fortunate because "The things I've said to you are nothing compared to what I said to her, and you
11 are far better looking."¹⁰ At that moment, Ms. Zavala sensed the futility of trying to discourage or deter the
12 Grievant.

13 On a dress-down day at work in April 2003, Ms. Zavala was rather frazzled with personal matters
14 and hurriedly donned a swishy warmup suit for work. She was standing out back on a smoking break with
15 the Grievant when he commented that it was dress-down day at the office. Ms. Zavala said she was dressed
16 down, and the Grievant responded, "No, I mean all the way down." He then wondered aloud why WLA had
17 not adopted such a dress code or policy. Interpreting these comments to mean that she should report to work
18 naked, Ms. Zavala told the Grievant to "fuck off" and walked away to resume work at her station.

19 When returning to her workstation, Ms. Zavala decided to place her partially consumed bottle of ice
20 tea in a refrigerator that employees from both agencies used. She later returned to consume the remainder
21 of the ice tea and actually took a big gulp of it when she felt something in her mouth and observed a
22 translucent, semi-gelatinous glob at the bottom of the bottle and realized that she had swallowed some of that

⁹ Joint Exhibit No. 2, at 3.

¹⁰ Joint Exhibit No. 4, at 3.

1 material, which ultimately turned out to be "Amylase, a component of saliva and other body fluids."¹¹ She
2 thought it was either sputum or phlegm that someone had deposited in the bottle. That thought caused her
3 to gag and ultimately to regurgitate several times. The ice tea incident convinced Ms. Zavala to report it
4 along with a history of the Grievant's sexual misconduct to her supervisor, Mr. Joseph Burkemer. The ice
5 tea incident triggered an administrative and a criminal investigations by the highway patrol on or about April
6 7, 2003. In addition, that incident together with the cumulative effects of the Grievant's sexually harassing
7 behavior caused Ms. Zavala to quit her job for yet a third time, though it is unclear which event played the
8 larger role in her decision.¹²

9 Before the ice tea incident, Ms. Zavala had mentioned the Grievant's conduct to her husband and
10 a few female coworkers, including Ms. Nancy Buckingham. Ms. Zavala's husband and Ms. Buckingham
11 strongly urged the Grievant to apprise Mr. Berkermer of the problem. In fact, Ms. Zavala's husband became
12 so adamant about her reporting the matter that she stopped telling him about the Grievant's conduct because
13 she felt that her husband did not understand, and she did not want to be pressured into reporting the Grievant.
14 Actually, she voiced several reasons for not reporting the Grievant. First, she did not feel comfortable talking
15 to Mr. Berkermer about the problem, in part because he was a male.¹³ Second, the Grievant apparently had
16 a relative employed by the Highway Patrol. Third, Ms. Zavala did not want to appear too sensitive because
17 coworkers might feel that they could not relax and jest in her presence. Fourth, she was still a relatively new
18 employee in WLA and did not wish to rock the boat. Finally, Ms. Zavala felt that she could handle the
19 situation herself, a view that she also communicated to Ms. Jill Hartsell, a coworker.¹⁴

20 In November or December 2002, Ms. Buckingham alerted Mr. Berkermer to Ms. Zavala's plight with
21 the Grievant. Mr. Berkermer subsequently mentioned the problem to the Grievant and to Ms. Zavala. He

¹¹ Joint Exhibit No. 9, at 17 (OSHP Crime Lab Report)

¹² Joint Exhibit No. 4, at 6.

¹³ *Id.* at 3.

¹⁴ *Id.* at 9.

1 broached the subject with Ms. Zavala when she happened to come into his office for an unrelated reason.
2 They thoroughly discussed the events that had occurred up to that time.¹⁵ In November or December 2002,
3 Mr. Berkermer advised the Grievant that he should watch his comments, some of which were inappropriate
4 and unappreciated and the Grievant responded along the lines of, "Oh yeah, right."

5 **A. The Grievant's Version—Absolute Denial**

6 During an administrative investigatory interview and before the Undersigned in the arbitral hearing,
7 the Grievant flatly denied any and all of the foregoing comments that Ms. Zavala attributed to him.
8 Furthermore, he even *denied* that Mr. Berkermer ever spoke to him about making offensive comments to Ms.
9 Zavala or any other female employee,¹⁶

10 The Grievant denied ever having a confrontation with Ms. Zavala¹⁷ and that he tampered with her
11 ice tea on April 4, 2003. The Grievant also denied telling Ms. Zavala about his prior encounters with charges
12 of sexual harassment. Instead, he claimed that Ms. Buckingham informed Ms. Zavala about that subject and
13 told her to stay away from the Grievant. Indeed, when asked why Ms. Zavala would marshal so many
14 scurrilous complaints against him, the Grievant said that Ms. Zavala and Ms. Buckingham had conspired to
15 take him down. He further claimed that when he heard about Ms. Buckingham's statement he told Ms.
16 Zavala that if he ever said or did anything offensive to her, she should confront him about it and he would
17 stop.¹⁸ In other words, the Grievant's explanation of why Ms. Zavala had lodged complaints against him was
18 that he simply had been set up.¹⁹

19 **III. Relevant Contractual Provisions and Work Rules**
20 **ARTICLE 2—NON-DISCRIMINATION**

21 Neither the Employee nor the Union shall discriminate in a way inconsistent with the laws of the United
22 States or the State of Ohio on the basis of race, sex. . . .

¹⁵ Joint Exhibit No. 7, at 8.

¹⁶ Joint Exhibit No. 4, at 4

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*, at 5.

1 24.01- Standard

2 Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the
3 burden of proof to establish just cause for any disciplinary action.

4 24.02- Progressive Discipline

5 The Employer will follow principles of progressive discipline. Disciplinary action shall be commensurate
6 with the offense.

7 Disciplinary action shall include:

- 8 A. one or more oral reprimand(s) (with appropriate notation in employee's file);
9 B. one or more written reprimand(s);
10 C. a fine in an amount not to exceed five (5) days pay; for any form of discipline; to be
11 implemented only after approval from OCB;
12 D. one or more day(s) suspensions;
13 E. termination.

14 Rule 501.01 (C)(10) (D) – Failure of Good Behavior.

15 **IV. Summaries of the Parties Arguments**

16 **A. Summary of the Agency's Arguments**

- 17 1. Ms. Zavala's testimony was concise, consistent and unimpeachable.
18 2. The Grievant's demeanor throughout the course of the administrative investigation and during the
19 period is indicative of his lack of credibility and untruthfulness.
20 3. Sgt. Brewster's training includes Successful Interview and Interrogation Techniques.
21 4. The Union's witnesses showed obvious bias or provided testimony that was irrelevant to the
22 underlying issue in the case.
23 5. The Grievant was on clear notice that his behavior was unwelcome and offensive.
24 6. The Employer has satisfied the "Clear and Convincing" standard in this case.

25 **B. Summary of the Union's Arguments**

- 26 1. Ms. Zavala's testimony was rife with internal and external inconsistencies. Therefore, her credibility
27 as a witness in this dispute is severely damaged.
28 2. Ms. Zavala's past also impugns her credibility and character.
29 3. The Grievant had nothing to hide and categorically denied all of Ms. Zavala's accusations.
30 4. The Grievant's sexual harassment training taught him to recognize and avoid sexually harassing
31 conduct.
32 5. Sergeant Brewster admitted that her interview techniques were less than 100 percent accurate.

33 **V. The Issue**

34 Was the Grievant terminated for just cause? If not, what shall deliver to be?

35 **VI. Discussion and Analysis**

36 **A. Evidentiary Standards, the Contract, and External Law**

37 The Collective-Bargaining Agreement contains a nondiscrimination provision that referentially

1 incorporates both federal and state Antidiscrimination law. However, the Arbitrator will resolve this dispute
2 under the contractual *just cause* clause, without a rigorous application of external law but still following the
3 general guidelines and structure of federal law so that the opinion and award are not repugnant to that law.

4 Because this is a disciplinary dispute, the Agency has the burden of proof or persuasion with respect
5 to its charges against the Grievant. Also, because sexual harassment is a particularly stigmatizing charge
6 with potentially far-reaching and damaging effects on the subjects of that charge, the Agency must establish
7 its case against the Grievant by *clear and convincing* evidence in the arbitral record as a whole, rather than
8 by the customary preponderance of the evidence. In anticipation of this heightened standard, the Agency has
9 offered a definition of clear and convincing evidence as evidence that establishes the “truth of the facts
10 asserted is *highly probable*.” Accordingly, in this case, the Agency must adduce evidence in the arbitral
11 record as a whole, showing that: (1) The Grievant engaged in the alleged misconduct; (2) The conduct
12 constitutes “Failure of good behavior”; and (3) The penalty imposed is neither unreasonable, arbitrary, nor
13 capricious. Doubts with respect to these issues shall be resolved against the Agency.

14 **B. Proof of Sexual Harassment**

15 The threshold issue here is whether the Grievant subjected Ms. Zavala to sexually the inappropriate
16 comments and conduct that she alleges. Because there are no eye witnesses other than Ms. Zavala and the
17 Grievant, the resolution of this dispute turns entirely on their credibility. Furthermore, as discussed below,
18 the Grievant’s and Ms. Zavala’s positions suffer from some internal and external inconsistencies.

19 **1. Internal Inconsistencies of Ms. Zavala’s Account**

20 Ms. Zavala’s account of her encounters with the Grievant is not entirely consistent. For example,
21 during her criminal investigatory interview on April 8, 2003,²⁰ her administrative investigatory interview on
22 September 9, 2003,²¹ and the arbitral hearing on September 23, 2003, Ms. Zavala said she made the “fuck

²⁰ Joint Exhibit No. 9, at 23.

²¹ Joint Exhibit No. 7, at 14.

1 off" statement in response to the Grievant's comment about dressing "all the way down." But in her written
2 statement set forth below, she asserted that she told the Grievant to "fuck off" in response to his specific
3 comments about her breast. Following is the relevant portion of the written statement Ms. Zavala drafted
4 on April 5, 2003:

5 I was outside and he had made the comment about seeing *less of me and more of those*
6 *referring to my breast and I told him whatever, fuck off* I was not in the mood that day for
7 nasty comments I was drinking ice tea and took a few drinks of it and put it in the breakroom
8 refrigerator. . . .¹²²

9 In fact, the April 5 written statement suffers from internal inconsistencies. On one page, Ms. Zavala
10 attributes the "fuck off" statement to the Grievant's reference to her breast.¹²³ On the very next page,
11 however, she attributes that same statement to the Grievant's suggestion that she dressed "all the way
12 down."¹²⁴

13 Clearly, Ms. Zavala is confused, which is one problem. The other problem is that she produced the written
14 statement comes before the other three and, absent some plausible explanation, one would expect Ms.
15 Zavala's recollection to have been clearer on April 5, 2003 than at any subsequent time. Furthermore, other
16 things equal, a written statement affords the writer more time to contemplate, consider, and recall the events
17 in question.

18 Ms. Zavala also stated, during her administrative interview, that she had reported the Grievant's
19 behavior to Supervisor Polly Radel on April 5, 2003.¹²⁵ She told Ms. Radel that the Grievant had been
20 sexually harassing her since October 2002.¹²⁶ Yet, during the arbitral hearing, Ms. Zavala specifically stated
21 that the Grievant had been harassing her since September 2002.

¹²² Joint Exhibit No. 4, at 19 (emphasis added).

¹²³ *Id.*

¹²⁴ Joint Exhibit No. 4, at 20.

¹²⁵ *Id.* at 5.

¹²⁶ *Id.* at 1.

1 **C. The Grievant's Denials**

2 As pointed out above, the Grievant flatly denied all accusations against him, including the fact that
3 Mr. Berkermer spoke to him about making sexual comments. The difficulty for the Grievant is that even
4 though Ms. Zavala's case suffers from some internal inconsistencies, the allegations that she made are
5 sufficiently consistent to establish that *something untoward occurred* between her and the Grievant. In
6 addition, the Arbitrator finds that Mr. Berkermer credibly testified that he spoke to the Grievant about his
7 offensive language toward Ms. Zavala and perhaps other female employees, which tends to reinforce the
8 position that the Grievant was engaged in sexual misconduct. Nor would Mr. Berkermer have any apparent
9 reason to falsely accuse the Grievant.

10 Furthermore, the Grievant's position also contains internal inconsistencies. On September 5, 2003,
11 Sergeant C. L. Brewster and Sergeant C. R Bower held an investigatory interview with the Grievant in the
12 presence of Labor Relations Representative Louella Jeter. During the early stage of the interview, the
13 following exchange occurred between Sergeant Brewster and the Grievant:

14 Sergeant Brewster: Have you ever approached . . . [Ms. Zavala] at work and told her she looks nice?

15 The Grievant: I have uh, done that.

16 Sergeant Brewster: On how many occasions would you say you've done that?

17 The Grievant: Probably in the last. . . I mean, it's uh. . . I mean, she's. . . I know she don't have
18 money, you know, and she um, don't dress as well as everybody else. . . .

19 Sergeant Brewster: Mmm hmmm

20 The Grievant: You know, and I'll maybe. . . I'll say you look nice, you know. And she might have
21 spots on her or wherever, you know, on her clothes. But I tell her she looks nice
22 anyway, you know, to make her feel good, and that's cause I. . . cause I know she
23 don't have a lot of money, you know. . . .¹²⁷

24 Yet, later in the interview, a starkly contrasting exchange takes place:

25 Sergeant Brewster: Have you told . . . [Ms. Zavala] which clothes look best on her?

26 The Grievant: No, cause I *don't pay no attention* to what she wears.

27 Sergeant Brewster: So you've told her that, you know, you look nice today; but you haven't . . . said
28 you should wear this sweater cause it looks better on you?

29 The Grievant: No. I don't even have no idea what she wears.¹²⁸

¹²⁷ Joint Exhibit No. 6, at 3.

¹²⁸ Joint Exhibit No. 6, at 7-8 (emphasis added).

1 In the first exchange, the Grievant clearly reveals a keen interest in making Ms. Zavala feel good
2 about her attire by offering favorable complements and was carefully observing even the spots or stains on
3 her clothing. Conversely, in the second exchange, he categorically denied having paid any attention to Ms.
4 Zavala's clothing. The Arbitrator therefore does not find the Grievant to be a credible witness and cannot
5 accept his flat and categorical denial of any unacceptable interaction with Ms. Zavala from September 2002
6 through April 2003. In short, the evidence clearly and convincingly establishes that the Grievant engaged
7 in debilitating sexual misconduct toward Ms. Zavala, as evidenced the details of her account and buy her
8 decision to quit her job, which she presumably needed, at least in part because of the Grievant's repeated
9 sexual conduct and comments toward her. Having concluded that the Grievant clearly and convincingly
10 engaged in a pattern of sexual conduct toward Ms. Zavala, the remaining question is the extent to which that
11 conduct was unwelcome and offensive to Ms. Zavala.

12 **D. Proof of Hostile Environment Sexual Harassment**

13 Conduct that creates actionable hostile environment sexual harassment must be gender-based, of a sexual
14 nature, pervasive, sufficiently intense to adversely affect the victims ability to perform her job, offensive,
15 and unwelcome. The facts in this case establish that the Grievant's conduct was gender-based, of a sexual
16 nature, and sufficiently pervasive because it occurred almost daily. The remaining issues are whether the
17 Grievant's conduct was unwelcome, sufficiently offensive, and adversely affected Ms. Zavala's job
18 performance.

19 In evaluating these factors, the Arbitrator notes that Ms. Zavala's case has several rather inexplicable
20 shortcomings, which individually and cumulatively raise some question about the extent to which she found
21 the Grievant's conduct offensive and unwelcome. The first shortcoming is that after enduring approximately
22 seven months of almost daily sexually harassing conduct by the Grievant, Ms. Zavala was able to recall only
23 four or five specific events, none of which carry a date certain. Second, Ms. Zavala stubbornly refused to
24 report those annoying, oppressive, and humiliating encounters to management, even though she was

1 admittedly aware of grievance machinery established for that purpose. And she readily admitted that she
2 knew she should have quickly reported the problem to her supervisor. Finally, evidence in the record clearly
3 establishes that Ms. Zavala is quite capable of forcefully reporting an incident that sufficiently upsets her,
4 as evidence by her willingness not only to openly challenge her co-workers practice of making racist and
5 ethnic slurs, but also to quit her job *on the spot* in indignant protest. Yet, she could not bring herself to report
6 what she claims to have been a continual stream of offensive and disgusting sexual comments and conduct
7 from the Grievant.

8 As pointed out above, these are noteworthy but not outcome-determinative considerations. Offsetting
9 them is clear and convincing evidence that the Grievant's conduct was offensive, unwelcome, and hampered
10 Ms. Zavala's ability to perform her job. Both objective and subject criteria are use to determine whether
11 established conduct of a sexual nature is sufficiently offensive and unwelcome. The objective criterion
12 focuses on whether a reasonable person under the same or similar circumstances as Ms. Zavala would have
13 found the Grievant's comments and conduct offensive and unwelcome. The subjective criterion asks whether
14 Ms. Zavala *herself* found the conduct offensive and unwelcome.

15 Evidence in the record establishes that the Grievant's conduct qualifies under both categories. His
16 comments about Ms. Zavala's: (1) sex life with her husband, (2) her breasts, (3) breast-feeding her infant, and
17 (3) her attire—how nice she looked would reasonably offend any reasonable woman under the same or similar
18 circumstances as Ms. Zavala. Furthermore, the Grievant's conduct satisfies this subjective standard, as
19 evidenced by Ms. Zavala's decision to leave her employment in considerable part because of the Grievant's
20 sexual conduct and comments toward her. The sexual harassment had already set the stage for her
21 resignation before the ice tea incident.

22 Similarly, the Grievant's sexual conduct and comments toward Ms. Zavala also sufficiently interfered
23 with her ability to perform her job duties, again as evidence by her willingness to quit a job that she
24 presumably needed. In fact, the Grievant's established sexual behavior toward Ms. Zavala was part of the

1 force—along with the ice tea incident—that constructively discharged her. Based on the foregoing discussion,
2 the Arbitrator hereby finds that the Grievant’s conduct was unwelcome, offensive, adversely affected Ms.
3 Zavala’s job performance, and ultimately was a major factor in constructively discharging her.

4 **VII. The Penalty Decision**

5 Because the Agency has clearly and convincingly established that the Grievant engaged in misconduct
6 that constituted hostile environment sexual harassment, which qualifies as failure of good behavior, some
7 measure of discipline is indicated. Assessment of the proper quantum of discipline requires an evaluation
8 of the mitigative and aggravative factors as well as an ultimate determination of whether the penalty imposed,
9 removal, is unreasonable, arbitrary, or capricious under the circumstances of this case.

10 **A. Aggravative Factors**

11 The two aggravative factors that weigh most heavily against the Grievant are the serious nature of his
12 misconduct in this dispute and his resistance to rehabilitation despite having had training in sexual
13 harassment pursuant to an earlier violation. That violation in of itself is not an aggravative factor in this
14 disciplinary assessment. However, the training that the Grievant had together with his continued engagement
15 in the same or similar sexual misconduct strongly indicates his lack of capacity for rehabilitation. And given
16 the potential liability for the Agency in this situation, reinstatement is not a workable situation.

17 **B. Mitigative Factors**

18 The Grievant’s thirteen years of tenure and his satisfactory performance record are mitigative factors,
19 but as suggested above, the aggravative factors and demonstrated recidivism outweigh any mitigative factors
20 the Grievant has to offer in this dispute.

21 **C. Propriety of the Penalty**

22 For the reasons set forth above, the Arbitrator holds that removal of the Grievant for the demonstrated
23 misconduct in this dispute is for just cause and is neither arbitrary capricious or unreasonable.

1 **VIII. The Award**

2 For all the reasons set forth in this opinion, the grievance is hereby **DENIED**.

3



Robert Brookins, Labor Arbitrator, J.D. Ph.D.