BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB CASE NO. 32891
	)	
JOSE L. FLORES, Jr.	)	**BOARD DECISION**
	)	(Precedential)
From dismissal from the position	)	
of Service Assistant-Maintenance	)	**NO. 94-24**
(Intermittent) with the	)	
Department of Transportation at	)	
Pomona	)	August 9, 1994

Appearances: There was no appearance for appellant.[1] Patricia A. Cruz, Attorney, on behalf of the respondent, Department of Transportation.

Before: Carpenter, President; Ward, Vice President; Stoner, Bos and Villalobos, Members.

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) in the appeal of Jose L. Flores, Jr. (appellant or Flores). Appellant was dismissed from his position as Service Assistant-Maintenance (Intermittent) with the Department of Transportation (Department or Caltrans) at Pomona primarily for fabricating an offensive statement about his co-worker and then attributing this statement to another co-worker; failing to follow his supervisor's instructions; and being discourteous to a court referral worker.

[1] Appellant was, however, represented at the hearing before the Administrative Law Judge by David L. Hamilton, Business Representative, Operating Engineers, Local 501.

The ALJ who heard the appeal sustained the dismissal. The Board rejected the ALJ's Proposed Decision, deciding to hear the case itself, because of concern regarding the validity of the ALJ's finding of sexual harassment. After a review of the entire record, including the transcript and the written and oral arguments presented to the Board, the Board dismisses the charge of unlawful discrimination, including sexual harassment, but sustains appellant's dismissal on other grounds as set forth below.

FACTUAL SUMMARY

Fabricated Offensive Speech

Appellant was appointed a Service Assistant-Maintenance (Intermittent) on February 9, 1991. At the time of the incidents that form the basis of this adverse action, May through August of 1992, appellant was working under the supervision of Gary Haney, a Caltrans Maintenance Supervisor. Christine L. (hereinafter "L") and Robert Sonora were also members of Haney's crew but, in May 1992, Sonora was off work on sick leave. L, Sonora and appellant had worked together for several years without incident. On May 20, 1992, L and appellant were working together fixing a ground valve. Appellant appeared hesitant to tell L something. He stated that he did not know if he should speak but he intimated that he wanted to be fair to L and let her know what was going on and that it was not fair. L urged appellant to speak.

Appellant then told L that Sonora had told him that every

time he (Sonora) saw L bent over working, Sonora wanted to have anal sex with her.[2] Appellant also attributed to Sonora a comment referring to L as "two-ton titty."

L testified that she originally believed appellant when he told her of Sonora's alleged statement. She testified that appellant sounded very sincere.

L reported appellant's comments to Haney who agreed to investigate. Appellant initially told Haney that Sonora made these comments about L. When Sonora returned to work a few days later, however, and Haney confronted him, Sonora denied making the statements. Haney then confronted appellant. Appellant changed his story and admitted to Haney that he had lied and that he himself made up the offensive comments and attributed them to Sonora.

Appellant also told Haney that his purpose in making the false comments was to get in tight with Haney and the crew in order to receive a promotion involving the supervision of others. In addition, appellant told Sonora that he had "started some shit" that would get him in tight with Haney and the lead worker.

When L heard that Sonora denied making the statement, she testified that she, in effect, did not know who was lying. L testified, "I don't trust anybody anymore."

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[2] The exact words appellant attributed to Sonora were that he wanted to "fuck her in the ass and fuck her hard."

Packer Truck Incident

As part of its regular road work, the Department assigns court referral workers to help clean up. A court referral worker is a person assigned by the court to do labor as part of his or her criminal sentence. On August 10, 1992, appellant was told to assist Sonora who was supervising court referral workers. Appellant was to operate the packer truck by loading and packing bushes. Appellant went to the location, but instead of assisting Sonora, he occupied himself painting and polishing the truck.

Appellant admitted his actions. He explained that Haney did not like anyone hanging around, so he occupied himself with "detailing" the truck.

Court Referral Worker Incident

According to Department policy, only crew leaders holding a civil service rating of Caltrans Maintenance Worker, or above, may supervise court referral workers. In accord with this policy, appellant and other crew members had been directed not to correct court referral workers, but to immediately report any problem to a Program Supervisor.

On August 10, 1992, appellant ignored this policy. While at the job site, appellant bothered the female court referral worker by urging her several times to "pick up" and "work harder." Appellant threatened her with a loss of credit for the day. When the worker reported the incident to appellant's supervisor, she

described appellant as "harassing" or "dogging" her. The court worker was very upset and concerned that she might not get credit for the day.

Sonora confirmed the court worker's report. Appellant admitted that he may have told the worker that she might not receive credit for the day.

Based on the above incidents, the Department dismissed appellant, charging him with inexcusable neglect of duty, insubordination, dishonesty, discourteous treatment of a co-worker, willful disobedience, other failure of good behavior causing discredit to his employment and employer and unlawful discrimination pursuant to Government Code section 19572, subdivisions (d), (e), (f), (m), (o), (t) and (w).

ISSUES

This case presents the following issues for discussion:

a) Whether the incident concerning appellant's alleged fabrication of a statement he attributed to his co-worker constituted sexual harassment, and,

b) What is the appropriate penalty under all the circumstances?

DISCUSSION

The Board initially rejected the ALJ's decision because of concern that the incident here did not rise to the level of sexual harassment. Sexual harassment is but one of the causes

for discipline set out under Government Code § 19572, subdivision (w) which prohibits unlawful discrimination.[3] Since sexual harassment is not defined in the statute, over the years the Board has sought guidance in various analogous legislation and case law.

In the Board's Precedential Decision Robert F. Jenkins (1993) SPB Dec. No. 93-18, the Board adopted the definition of sexual harassment set out in Title VII of the Civil Rights Act of 1964 (42 U.S.C. section 2000e et seq.) and construed by the United States Supreme Court in Meritor Savings Bank v. Vinson (1986) 477 U.S. 57. In Jenkins, the Board discussed the two categories of sexual harassment set out in Title VII.

The first, "quid pro quo" sexual harassment was defined as:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature ... when 1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment [or] 2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual. [29 C.F.R. section 1604.11(a).]

The second category of sexual harassment is referred to as "hostile environment harassment" and was acknowledged as a cause of action in Meritor Savings Bank v. Vinson, supra. Federal EEOC

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[3] Government Code § 19572, subdivision (w) prohibits:Unlawful discrimination, including harassment, on the basis of race, religious creed, color, national origin, ancestry, physical handicap, marital status, sex, or age, against the public or other employees while acting in the capacity of a state employee.

regulations define the hostile environment theory to include:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature ... when such conduct has the purpose or effect of, unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment. [29 C.F.R. section 1604.11(a).]

In Jenkins, we also noted that California courts, construing the prohibition against sexual harassment set forth in Government Code § 12940 (h), also applied cases decided under Title VII to determine whether the harassment meets the requisite level of being "sufficiently severe or pervasive to alter the conditions of employment or create an abusive working environment." [Id. at p. 11 quoting Fisher v. San Pedro Peninsula Hospital (1985) 214 Cal.App.3d at 609]. In argument before the Board, the Department's representative argued that the federal and state sexual harassment standards used to decide employer liability are too high and should not be used in determining what constitutes sexual harassment for purposes of discipline. Instead, the Department argued that the Board should measure the employee's conduct against the Department's own sexual harassment policy.

While we agree that an employer need not delay disciplinary action until a "wrongdoer has so clearly violated the law that the victims are sure to prevail in a Title VII action" [Carosella v. U.S.P.S. (Fed. Cir. 1987) 826 F.2d 638, 643; See also, Rudy Avila (1994) SPB Dec. No. 94-17], we believe that to

charge unlawful discrimination under Government Code section 19572, subdivision (w), an employer must prove at a minimum that the conduct is "sufficiently severe or pervasive to create an abusive working environment." [See Howard v. Department of the Air Force (Fed. Cir. 1989) 877 F.2d 952; Rudy Avila, supra.]

This is not to say that an employer is in any way barred from taking prompt, effective action to end the harassment by discipline or other means. An employer is bound to do so. Conduct which may not meet the minimum standard for a finding of sexual harassment may be chargeable as cause of discipline as discourteous treatment [Government Code § 19572 (m)]. If an employer has a sexual harassment policy that sets forth standards of conduct for the workplace, and the policy has been properly enacted and disseminated to its employees, conduct that violates the policy might also be chargeable as willful disobedience [Government Code § 19572, subdivision (o)].

Unfortunately, Caltran's policy concerning sexual harassment at the workplace was not introduced into evidence at the hearing and cannot be used as a basis for the Board's decision. Thus, in this case, we must determine whether appellant's conduct constitutes unlawful discrimination in the nature of sexual harassment and/or discourtesy.

The first category of sexual harassment, quid pro quo, has no application to the present case. There was no sexual bargain.

L did not have to submit verbal or physical conduct of a sexual nature nor did appellant have or claim power to provide or withhold any benefits of employment.

The second category is more relevant. The offensive comment made by appellant has the potential effect of unreasonably interfering with L's work performance or creating an intimidating, hostile or offensive working environment for her. However, the Department did not prove this. The only statement in the record which indicates how the comment affected L was her statement that now she can't trust anyone. From L's testimony, her lack of trust appears to arise as much from her inability to discern who made the offensive statement as from the statement itself. There was no showing that the comment altered in any way L's conditions of employment or created an abusive working environment.[4] Thus, based on the facts presented at the administrative hearing, we do not find sufficient evidence that appellant's conduct constituted unlawful discrimination in the nature of sexual harassment.

Discourtesy

Although we fail to find appellant's actions constituted unlawful discrimination, we do agree with the ALJ that the fabrication of offensive statements such as those appellant

[4] Although not examined at the hearing, the comment attributed to Sonora has the potential for creating a hostile working environment, not only for L, but for Sonora as well.

attributed to Sonora constitutes cause for discipline as discourteous treatment of other employees under Government Code section 19572 (m). Sexually explicit statements of this sort are clearly outside the normal dictates of civilized behavior.

Other Charges

Fabricating statements and falsely attributing these statements to a co-worker constitutes cause for discipline as dishonesty under Government Code § 19572, subdivision (f).

In addition, appellant's failure to follow his supervisor's instruction to assist Sonora, by loading and packing bushes, constitutes an inexcusable neglect of duty and willful disobedience under Government Code § 19572, subdivisions (d) and (o). Appellant's responsibility on August 10, was to operate the packer truck, not to polish and paint the truck.

Finally, we find that appellant's treatment of the court referral worker was discourteous treatment of the public as prohibited by Government Code § 19572, subdivision (m). Appellant's actions were unreasonably harassing and intimidating.

We do not find cause for discipline for insubordination or other failure of good behavior.

Penalty

When performing its constitutional responsibility to review disciplinary actions [Cal. Const. Art. VII, section 3(a)], the Board is charged with rendering a decision which, in its judgment

is "just and proper". [Government Code § 19582.] In determining what is a "just and proper" penalty for a particular offense, the Board has broad discretion. [See Wylie v. State Personnel Board (1949) 93 Cal.App.2d 838.] The Board's discretion, however, is not unlimited. While the Board considers a number of factors it deems relevant in assessing the propriety of the imposed discipline, among the factors the Board must consider are those specifically identified by the Court in Skelly v. State Personnel Board (Skelly) (1975) 15 Cal.3d 194 as follows:

> ...[W]e note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repeated is likely to result in [h]arm to the public service. (Citations.) Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence. [Id. at 218].

In this case, appellant's conduct was harmful to a female co-worker who, as a result of appellant's actions, months later still testified to uncertainty about the incident. Appellant also sought purposely to harm a co-worker by discrediting him and scheming to undermine this co-worker's relationship with the other crew members and the crew supervisor. The harm to the public service is inherent in conduct which destroys the cohesiveness of working groups.

The circumstances surrounding this misconduct do not require mitigation of the penalty of dismissal. Appellant is a short term employee who sought by purposeful design to discredit his

co-worker and replace him in his supervisor's good graces. The means chosen, falsely attributing a highly offensive statement to an employee who was off work, demonstrate a malicious mind, as do the statements themselves. The public service has no place for such an individual.

CONCLUSION

For all of the reasons set forth above, the Board finds cause for disciplining appellant for dishonesty and discourteous treatment of other employees under Government Code section 19572, subdivisions (f) and (m) in connection with sexually explicit statements fabricated by appellant and dishonestly attributed to a fellow worker.

We find that appellant's failure to follow his supervisor's instruction in the packer truck incident constituted inexcusable neglect of duty and willful disobedience in violation of Government Code § 19572, subdivisions (d) and (o). In addition, we find that appellant's treatment of the court referral worker was discourteous treatment in violation of Government Code § 19572, subdivision (m).

The penalty of dismissal is sustained.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that:

1. The above-referenced action of the Department of

Transportation dismissing appellant Jose L. Flores is sustained.

2. This opinion is certified for publication as a Precedential Decision (Government Code § 19582.5).

THE STATE PERSONNEL BOARD

Richard Carpenter, President
Lorrie Ward, Vice President
Alice Stoner, Member
Floss Bos, Member
Alfred R. Villalobos, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on August 9, 1994.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board