BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB Case No. 37657
	)	
RONDA PHILLIPS	)	**BOARD DECISION**
	)	(Precedential)
	)	
From 60 days suspension from the position of Dental Assistant with Sierra Conservation Center, Department of Corrections at Jamestown	)	**NO. 96-14**
	)	September 4-5, 1996

Appearances: Anne Giese, Attorney, California State Employees Association, on behalf of appellant, Ronda Phillips; Hector C. Lozano, Correctional Counselor II, Department of Corrections, on behalf of respondent, Department of Corrections.

Before: Lorrie Ward, President; Floss Bos, Vice President; Ron Alvarado, Richard Carpenter and Alice Stoner, Members.

DECISION

This case is before the State Personnel Board (Board) for determination after the Board rejected the attached Proposed Decision of the Administrative Law Judge (ALJ) in the matter of the appeal by Ronda Phillips (appellant) from a sixty days' suspension from the position of Dental Assistant with Sierra Conservation Center, Department of Corrections at Jamestown (Department).

Appellant was suspended for numerous instances of inappropriate touching of a female co-worker, for making an inappropriate remark, and for lying during an investigatory interview. The ALJ found that appellant's misconduct constituted cause for discipline under Government Code section 19572, subdivisions (f) dishonesty, (m) discourtesy and (t) other failure

of good behavior, but declined to find that appellant's conduct

constituted sexual harassment under subdivision (w) unlawful discrimination. The Board rejected the ALJ's Proposed Decision to examine the issue of whether appellant's misconduct constituted sexual harassment.

After a review of the entire record, including the transcript, exhibits, and the oral and written arguments of the parties, the Board agrees with the findings of fact in the attached Proposed Decision and adopts these findings as its own. The Board also concurs with the conclusions of law set forth in the attached Proposed Decision in regard to Government Code 19572, subdivisions (f), (m) and (t). For the reasons that follow, the Board finds that appellant's misconduct constituted sexual harassment under Government Code § 19572, subdivision (w), unlawful discrimination, and that the penalty of sixty days' suspension originally taken by the Department should be sustained without modification.

ISSUES

The Board has been presented with the following issues for its determination:

1. Does same-sex sexual harassment constitute cause for discipline pursuant to Government Code § 19572, subdivision (w), unlawful discrimination including sexual harassment?

2. What is the appropriate penalty under the circumstances?

DISCUSSION

Same-sex Sexual Harassment

Government Code § 19572 includes as cause for discipline subdivision (w) which prohibits "Unlawful discrimination, including harassment, on the basis of . . . sex . . . against the public or other employees while acting in the capacity of a state employee." The meaning of the term "harassment on the basis of sex" is not defined in the statute. Consequently, over the years, the Board has sought guidance from analogous federal and state legislation and case law. Robert F. Jenkins (1993) SPB Dec. No. 93-18 at p. 9. Guidance has been sought from two main sources. The first is Title VII of the Civil Rights Act of 1964 (42 U.S.C. section 2000e et seq.) which has been construed by the United States Supreme Court to prohibit sexual harassment. Meritor Savings Bank v. Vinson (1986) 477 U.S. 57. The second source is the Fair Employment and Housing Act (FEHA) which prohibits harassment "because of . . . sex." Government Code § 12940 (h)(1); Fisher v. San Pedro Peninsula Hospital (1985) 214 Cal.App.3d 590, 608.

As noted in Jenkins, there are two generally recognized categories of sexual harassment: *quid pro quo* harassment and hostile work environment sexual harassment. "*Quid pro quo* sexual harassment occurs whenever an individual explicitly or implicitly conditions a job, a job benefit, or the absence of a job detriment, upon an employee's acceptance of sexual conduct." Nichols v. Frank

(9th Cir. 1994) 42 F.3d 503. Hostile work environment sexual harassment occurs when "discrimination based on sex has created a hostile or abusive work environment." Meritor Savings Bank, 447 U.S. at 66.[1]

Unsettled in the federal courts is the question of whether, and under what circumstances, Title VII provides a remedy for same-sex sexual harassment. Those federal courts which have rejected same-sex sexual harassment claims generally rely on the reasoning of Goluszek v. Smith (1988) 697 F.Supp. 1452. In Goluszek, an unsophisticated man with little or no sexual experience was humiliated when his male co-workers made explicit and offensive sexual comments, showed him pictures of nude women and poked him in the buttocks with a stick. The Goluszek court held that a male versus male hostile environment claim was not the "discrimination Congress was concerned about when it enacted Title VII." Id. at 1456. The court explained that Congress was concerned with discrimination "stemming from an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group." Id. The Goluszek court found that Title VII makes actionable "words or actions that [say]

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[1]California courts have also recognized a hybrid of these two theories. Under the hybrid theory, "unwelcome sexual advances [are demonstrated to be] sufficiently pervasive so as to alter the conditions of employment and create an abusive work environment." Mogilefsky v. Superior Court (1993) 20 Cal. App. 4th 1409, 1415.

the victim is inferior because of the victim's sex", id., and concluded that, because Goluszek was a male in a male dominated environment, he could not have been treated as an inferior *because of* his sex. In accord, Garcia v. Elf Atochen North America (5th Cir. 1994) 28 F.3d 446; Ashworth v. Roundup Co. (W.D. Wash 1995) 897 F. Supp. 489, 494.

A number of federal courts have directly rejected the reasoning of Goluszek. In Easton v. Crossland Mortgage (1995) 905 F. Supp. 1368, 1378, the court found that the plain language of Title VII did not preclude a same-sex sexual harassment claim. Likewise, another court found that Title VII's legislative history and the Supreme Court's decision in Meritor supported same-sex claims. Sardinia v. Dellwood Foods Inc. (1995) WL 640502 (S.D.N.Y.), 69 Fair Emp. Prac. Case (BNA) 705, 67 Emp. Prac. Dec. p. 43,784 (Goluszek erred in ignoring the legislative history of Title VII and in ignoring the sex neutral language used by the Supreme Court in Meritor.) The Equal Employment Opportunity Commission (EEOC) also takes the position that Title VII covers same-sex harassment. EEOC Compliance Manual, § 615.2(b)(3)(1987).[2]

Even among the federal courts which have recognized same-sex sexual harassment, however, there is disagreement over whether Title VII covers situations in which the harasser is heterosexual.

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[2]Courts often defer to the EEOC's interpretation of Title VII in light of the EEOC's responsibility to enforce the Act. See Meritor Savings Bank v. Vinson, 477 U.S. at 67.

For example, in McWilliams v. Fairfax County Bd. of Supervisors (4th Cir. 1996) 72 F.3d 1191, the court found that proof of homosexuality is critical in making a same-sex harassment claim cognizable under Title VII. Id. at 1195 n.5. The thinking behind this requirement is that, in an opposite sex, heterosexual interaction, there is a presumption that the harassment was because of the victim's gender, but, in a same-sex heterosexual interaction, there is no presumption that sexually suggestive conduct is "because of sex." Id.

Two California courts have addressed the issue of same-sex sexual harassment. In Hart v. National Mortgage & Land Co. (1987) 189 Cal. App. 3d 1420, the employer sought summary judgement against a male employee who claimed to have been sexually harassed by his male supervisor. Hart's supervisor allegedly subjected Hart to a series of verbal and physical interactions including grabbing Hart's genitals, grabbing Hart around the waist and trying to mount him, and making sexually suggestive gestures accompanied by crude remarks. According to the court, "Hart felt [his supervisor] was a pervert and was singling him out for this treatment. [Hart] did not believe, however, that [his supervisor] was doing this because he was interested in having sex with Hart."

In one terse paragraph, the Hart court granted summary judgment to the defendant stating:

> Government Code section 12940, as here pertinent, prohibits an employer from discriminating against his

> employee in the "terms, conditions or privileges of employment. . .because of sex." Hart does not here allege, nor do the depositions show, that [the supervisor] harassed Hart because of Hart's sex. Absent this, section 12940 does not apply.

Six years later, another court of appeal, this time in the Second District, took up the question of same-sex sexual harassment. In Mogilefsky v. Superior Court (1993) 20 Cal. App.4th 1409, a creative editor for a motion picture company alleged that, among other things, his supervisor demanded that he stay overnight in the supervisor's hotel suite, informed Mogilefsky that he would receive more money if he cooperated, made lewd and lascivious comments, and falsely implied to others that Mogilefsky had had anal sex with him. The Second District Court of Appeal refused to follow Hart explaining:

> Hart is of questionable value as legal precedent. The reviewing court's failure to deal with the undeniably sexual nature of the conduct to which Hart was subjected, is, to say the least, troublesome. Such conduct whether motivated by hostility or by sexual nature, is always "because of sex" regardless of the sex of the victim. Indeed, real parties in interest herein admit that if Hart had been a woman, the conduct alleged in that case would "unquestionably have constituted sexual harassment under § 12940. . ." Id. at 1415-1416.[3]

In Mogilefsky, the court of appeal went on to find that the plain language of section 12940 did not preclude same-sex sexual harassment. In addition, the court specifically rejected the

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[3]The court of appeal also distinguished Hart as interpreting section 12940, subdivision (a) which is aimed at various forms of employment discrimination while the Mogilefsky court was interpreting section 12940, subdivision (h). Id. at 1414.

"empowerment" rationale of Goluszek, holding that a person subjected to the behavior to which Goluszek was subjected was "entitled to the protection provided by Government Code § 12940 regardless of whether he or she is otherwise 'empowered.'" Id. at 1417.

The court also specifically rejected a requirement that the harasser's homosexuality be proven. The court held: "The focus of a cause of action brought pursuant to Government Code section 12940 is whether the victim has been subjected to sexual harassment, not what motivated the harasser." Id. at 1418. The Mogilefsky court's focus on the victim is similar to the focus of the Ninth Circuit in Ellison v. Brady (9th Cir. 1991) 924 F.2d 872 where the court found that perspective of the victim is the relevant inquiry, not the intention of the harasser. Id. at 880.

Thus, under Mogilefsky, a cause of action can be brought under section 12940, subdivision (h) under a theory of same-sex sexual harassment[4]. The same standards for determining whether

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[4] The court in Mogilefsky noted two FEHA cases which addressed the issue of same-sex sexual harassment and found such claims cognizable under FEHA. 20 Cal. App. 4th at 1416. Of particular interest is Department of Fair Employment and Housing v. Villazar de la Cruz, Inc. (1990) No. 90-04 in which the Commission found hostile work environment sexual harassment when Tina Ritchie, a female employee, repeatedly grabbed the breasts of another female employee. Ritchie claimed her behavior was meant to be merely playful, an explanation the FEHC found not to be credible. The commission found that Ritchie's conduct constituted a pattern of unwelcome conduct of a sexual nature. The Commission did not make a finding that Ritchie was homosexual or that the conduct was homosexual in nature.

sexual harassment has occurred that are applied in opposite sex sexual harassment complaints filed under the FEHA are to be applied to same-sex sexual harassment cases.

Given that Mogilefsky clarifies that a cause of action exists under the FEHA for same-sex sexual harassment, we believe it appropriate to conclude that an employee may be disciplined under Government Code section 19572(w) for engaging in same-sex sexual harassment.[5] To ascertain whether a department has cause to discipline an employee for same-sex sexual harassment, we will also apply the same standards we have always applied in cases where an employee is being disciplined for sexual harassment towards a member of the opposite sex. See, e.g., Robert J. Jenkins (1993) SPB Dec. No. 93-18.

Having found that Romine is protected under the law from sexual harassment by appellant, another female, we turn to the issues of whether she was subject to unwelcome sexual harassment, whether the harassment complained of was based on sex, and whether the harassment complained of was sufficiently severe and pervasive

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[5]As noted above, the Board has referred to both Title VII and FEHA case law to inform its interpretation of Government Code § 19572, subdivision (w) which prohibits sexual harassment in the state service. Where interpretation of these statutes diverge, however, the Board is, necessarily, more linked to FEHA. Both the Civil Service Act and the FEHA are California statutes. Both were amended at the same time to create better protection for victims of sexual harassment. (See Stats 1985 Ch. 1754 for amendments to both FEHA and section 19572 regarding sexual harassment.) Consequently, the Board gives great weight to FEHA case law.

so as to alter the conditions of her employment and create an abusive working environment. Fisher v. San Pedro Peninsula Hospital (1985) 214 Cal.App.3d 590, 609.

In the present case, the ALJ found that appellant repeatedly patted or grabbed Romine's buttocks, conduct which, Romine testified, made her feel embarrassed and humiliated. In fact, Romine testified to feeling "raped" by these unwanted touches. Appellant's other offensive conduct included playing with Romine's hair, kissing Romine on the lips, giving Romine a "bear hug" and asking Romine "Want to go home and go to bed with me?" We find that appellant's conduct is clearly of a sexual nature and, whether "motivated by hostility or by sexual interest, [such conduct] is always 'because of sex' regardless of the sex of the victim." Mogilefsky 20 Cal.App.4th 1415-1416.

Romine asserted that this unwelcome conduct made her feel embarrassed and humiliated. Thus, we find that Romine personally felt offended by the appellant's conduct.

Case law has established, however, that the fact that a victim is subjectively offended is not enough to establish sexual harassment: the conduct must also be offensive from an objective point of view. Harris v. Forklift (1993) 126 L. Ed. 2d 295, 302; see also Ellison v. Brady (9th cir. 1991) 924 F.2d 880. In Ellison, the Ninth Circuit Court of Appeals set forth the test as whether a "reasonable woman would consider [the conduct to be]

sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." 924 F.2d at 879.

In the instant case, the ALJ found that a reasonable woman would not construe appellant's conduct as sexual harassment. The ALJ appeared to base this finding on the reactions of two female coworkers who did not characterize the conduct they each witnessed as sexual in nature.[6] Neither of these women were present for all the incidents, however. As required by Harris, the Board must look at all the circumstances. 126 L. Ed. 2d at 302. Over a two year period, despite repeated requests that appellant stop, Romine was subjected to numerous pats and grabs of her buttocks, an unwanted bear hug, repeated fondling of her hair, and a kiss on the lips. Appellant's conduct is clearly conduct that a reasonable woman would find offensive.

In the instant case, appellant's offensive conduct was of a blatantly sexual nature comparable to the conduct in Hart which, as the court in Mogilefsky observed, would '"[u]nquestionably have constituted sexual harassment under § 12940"' if the perpetrator had been of the opposite sex of the victim. Mogilefsky 20 Cal. App. 4th at 1416. As discussed above, the conduct of repetitive

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[6]Youngberg saw appellant give Romine a bear hug, play with Romine's hair and heard appellant make the "Want to go to bed with me" comment. Garcia witnessed the kiss and initially attributed it to the Christmas holidays.

unwelcome touching, a bear hug, and a kiss on the lips and a suggestive remark, has been demonstrated to be both subjectively and objectively offensive. Finally, the repetitive nature of the sexual conduct is conduct sufficiently severe and pervasive to alter the terms and conditions of Romine's employment and create a hostile work environment. This is particularly true since Romine repeatedly asserted both verbally and non-verbally that the conduct was unwelcome and she wanted the conduct to stop.

Appellant's conduct constitutes sexual harassment pursuant to Government Code § 19572, subdivision (w), unlawful discrimination including sexual harassment.

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 is "just and proper". (Government Code section 19582.) In determining what is a "just and proper" penalty for a particular offense, under a given set of circumstances, 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. In the seminal case of

Skelly v. State Personnel Board (Skelly) (1975) 15 Cal.3d 194, the California Supreme Court noted:

> While the administrative body has a broad discretion in respect to the imposition of a penalty or discipline, it does not have absolute and unlimited power. It is bound to exercise legal discretion which is, in the circumstances, judicial discretion. (Citations) 15 Cal.3d at 217-218.

In exercising its judicial discretion in such a way as to render a decision that is "just and proper," the Board considers a number of factors in assessing the propriety of the imposed discipline. Among the factors the Board considers are those specifically identified by the Court in Skelly 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.)

Whether characterized as discourtesy or as sexual harassment, appellant's conduct created an uncomfortable and offensive working environment for Romine. While it is true that appellant has no prior adverse actions and, once a complaint had been filed, ceased her offensive conduct, it is also true that the victim of appellant's misconduct repeatedly asked her to stop her offensive conduct but was ignored. In addition, the ALJ found, and the Board agrees, that appellant was dishonest during her investigatory interview.

The sixty days' suspension taken by the Department is well supported under the circumstances and is sustained without modification.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, and pursuant to Government Code sections 19582, it is hereby ORDERED that:

1. The adverse action of a sixty days' suspension taken against Ronda Phillips is hereby sustained.

2. The Proposed Decision of the Administrative Law Judge is adopted to the extent it is consistent with this decision;

3. This decision is certified for publication as a Precedential Decision pursuant to Government Code section 19582.5.

THE STATE PERSONNEL BOARD

Lorrie Ward, President
Floss Bos, Vice President
Ron Alvarado, Member
Richard Carpenter, Member
Alice Stoner, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on September 4-5, 1996.

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C. Lance Barnett, Ph.D.
Executive Officer
State Personnel Board

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by RONDA PHILLIPS From 60 days suspension from the position of Dental Assistant with Sierra Conservation Center Department of Corrections at Jamestown	)	Case No. 37657

PROPOSED DECISION

This matter came on regularly for hearing before Kymberly M. Pipkin, Administrative Law Judge, State Personnel Board (SPB or Board), on August 23 and September 1, 1995, at Jamestown, California.

The appellant was present and was represented by Anne Giese, Attorney, California State Employees Association.

The respondent was represented by Hector C. Lozano, Correctional Counselor II, Department of Corrections (CDC).

Evidence having been received and duly considered, the Administrative Law Judge makes the following findings of fact and Proposed Decision:

I

JURISDICTION

The above 60 days suspension, effective at the close of business on June 8, 1995, and appellant's appeal therefrom, comply with the procedural requirements of the State Civil Service Act.

II

Appellant began working for the State of California as a Dental Assistant at Sierra Conservation Center (Sierra) on June 18, 1990. She has no prior disciplinary action.

III

As cause for discipline, respondent alleged that during 1993, appellant repeatedly touched the buttocks of a female dental assistant despite being requested not to do so; kissed her on the lips; gave her a bear hug from behind; asked her to go home and go to bed with her; played with her hair; and was less than honest about her activities during an investigative interview.

Respondent alleged that appellant's conduct constituted dishonesty, discourteous treatment of another employee, and other failure of good behavior, on or off duty, which caused discredit to the agency, and unlawful discrimination, including sexual harassment, in violation of Government Code section 19572, subdivisions (f), (m), (t), and (w), respectively.

In addition, respondent alleged violation of the CDC Director's Rules, Title 15, California Code of Regulations, section 3391 (Conduct), as legal cause for discipline. Any violation of this regulation is subsumed within the provisions of Government Code section 19572. Although a regulation may ". . .provide detail which amplifies the claimed application of a stated 'cause' to the case. . ." (*Negrete* v. *State Personnel Board* (1989)

213 Cal.App.3d 1160, 1168), a separate finding of violation of this regulation as legal cause for discipline is not required.

IV

PROCEDURAL ASPECTS

Respondent called five witnesses and introduced two exhibits which were received into evidence. Appellant testified on her own behalf, called three witnesses, and presented eleven exhibits which were received into evidence. Witnesses were sequestered. The case was submitted for decision after closing oral argument at the end of the hearing on September 1, 1995.

V

FINDINGS OF FACT

The Sierra dental clinic is a busy facility, unless the institution is on lock-down status. Three or four dental assistants, one office assistant, and five dentists work in close quarters. Along one wall are four small dental operatories separated by a waist-high walls, without doors. Oral surgeries are performed in the fifth operatory, a slightly larger room with a door.

Along the opposite wall is a reception area, and four small rooms, each with a door: a "hot room", which is locked and contains supplies; a sterilization room; an x-ray room; and a laboratory. The hallway between the two walls is fairly narrow.

The Chief Dentist, Dr. Arland Pafford (Pafford), has an office in an adjoining building.

VI

Appellant and Donna Romine (Romine) have worked at Sierra for approximately five years as dental assistants. They assist the dentists, take x-rays and sterilize instruments. A sterilized set of instruments is required for each patient, and dental assistants are therefore frequently in the sterilization room. The room is small, and it is difficult for two people to pass each other without touching.

VII

Romine contended that appellant frequently patted, slapped and/or grabbed her buttocks with her hand, usually in the sterilization room. Each physical contact lasted a second or two. Romine was certain that the physical contact was intentional. She could not remember any dates when appellant touched her buttocks, except for May 24, 1994. She estimated that appellant had grabbed her five times and patted her five times during 1993, usually in the sterilization room. Sometimes Romine told appellant to stop it. Other times, she just kept walking without comment. Romine was humiliated and embarrassed, and testified that she felt "raped" by the contact.

The last time that appellant patted Romine's buttocks on May 24, 1994, Romine filed a written complaint with Pafford about

appellant's action and other conduct which Romine found offensive.

Romine was unsure if any coworkers had witnessed the touching. She testified that she had been teased by some inmate-assistants who observed it. No other witnesses testified to observing appellant touch Romine on the buttocks. Appellant denied touching Romine's buttocks intentionally. Because of the close quarters in the dental clinic, she acknowledged that she has bumped into other employees, including Romine.

VIII

Romine testified that appellant played with her hair, which is waist-length. She estimated that these incidents occurred seven to ten times in 1993, although she could not cite specific dates. Except for a few occasions, no one else was present.

Loretta Youngberg (Youngberg), another dental assistant, saw appellant run her fingers through Romine's hair, and state, "I just love to run my fingers through her hair" twice. Youngberg did not remember the dates of these incidents, but recalled that they took place in 1993. The first time, Romine gestured for appellant to stop. The second time, Romine told appellant to stop touching her hair. Romine appeared embarrassed and offended both times. Youngberg did not believe there was anything sexual in the manner in which appellant touched Romine's hair.

Appellant denied that she played with Romine's hair at any time.

IX

Sometime during 1993, Youngberg was in the hot room, and Romine was inside the door. Appellant came up behind Romine, threw her arms around Romine's rib cage, and gave her a "bear" hug. Romine squirmed, and stated, "Don't, you're not my type. You're not a man." Appellant released Romine and laughed. The entire incident lasted three or four seconds. Romine appeared to be embarrassed and humiliated, according to Youngberg.

Appellant denied that she gave Romine a bear hug at any time. On several occasions, she placed her hands on Romine's rib cage to keep Romine from backing up onto her feet. Appellant has no toenails, and it is painful if someone steps on her feet.

X

During December 1993, Romine was seated in the assistant's chair in front of the reception counter where office assistant Gloria Garcia (Garcia) worked. The assistant's chair is somewhat higher than other chairs in the clinic. Garcia observed appellant "fly in", "smack" Romine on the lips with her lips, and continue down the hall. Romine appeared startled and embarrassed. Garcia was shocked. After a minute or two, Garcia told Romine, "Tell me you didn't see what I saw." According to Garcia, Romine stated, "Yes, you did." Romine testified that she remarked, "No, you didn't see anything." because she was embarrassed.

Garcia thought that appellant kissed Romine because of the festive nature of the holidays. She recalled the incident as occurring between Christmas and New Year's Day. Romine testified that the kiss occurred around the holidays, but could not say that it took place between Christmas and New Year's Day.

Appellant denied kissing Romine. She produced her time sheet for December 1993, which indicated that she was not at work between Christmas and New Year's Day.

XI

One morning in May 1994, Youngberg was in the sterilization room near the door. Romine was in the middle of the room and appellant was near the autoclav. Romine complained that she was tired. Appellant turned to Romine and stated, "I am too. Want to go home and go to bed with me?" Romine replied, "No thank you." She appeared to be offended. Youngberg recalled that the three coworkers were talking about how tired they were. Appellant told Romine, "You can come home and go to bed with me." Youngberg did not believe that appellant's remark was sexual, as appellant's voice was not leering or suggestive; Youngberg did characterize her comment as "weird." Romine took the comment seriously, believed it to have a sexual connotation, and considered it disgusting. She was embarrassed.

Appellant denied that she asked Romine to go to bed with her. On one occasion, she invited Romine to stay at her house, because

Romine was breaking up with a boyfriend who took drugs. Youngberg was present during this conversation, according to appellant. Appellant stated that Romine thanked her, and said she might accept if she could not find other accommodations.

XII

After Romine filed the complaint with Pafford, an investigation was conducted by Lieutenant Janice Leach (Leach). In September 1994, Leach interviewed appellant, who was accompanied by a union representative. Appellant had a back injury, and was in pain during the interview. Leach did not ask appellant if she was on any medication at the time.

Leach testified that appellant denied the allegations. Leach did not ask Romine when or how often appellant touched her buttocks. Therefore, Leach did not ask appellant about any specific incidents.

Appellant emphatically denied that she kissed Romine. She told Leach that she may have inadvertently touched Romine. Appellant testified that the interview took no more than 15 minutes.

XIII

Three dentists, Drs. Paul Berger (Berger), Michael Patterson (Patterson), and Robert Robertson (Robertson) testified that they did not see appellant touch Romine, hear any of the remarks alleged, or learn about the allegations through office gossip.

During 1993 and 1994, appellant usually assisted Robertson with oral surgeries. Robertson can see the door to the hot room from his operatory but cannot see inside the room; Berger can see directly into the sterilization room from his operatory; and Patterson can see into the hot room from his operatory.

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PURSUANT TO THE FOREGOING FINDINGS OF FACT, THE ADMINISTRATIVE LAW JUDGE MAKES THE FOLLOWING DETERMINATION OF ISSUES:

Appellant testified that Romine fabricated the incidents to distract attention from complaints appellant had filed about Romine's over-familiarity with inmates. Appellant wrote notes each day at work about events in the office, which she later transferred into a journal. Appellant intended to give her notes to Pafford, but did not do so. Appellant claimed that Romine knew about her notes, but no evidence supported this conclusion. Appellant contended that since 1990, she complained to Pafford on numerous occasions about Romine's over-familiarity with inmates, but Pafford never acted.

Berger believed that Romine misrepresented appellant's actions to retaliate against appellant for complaining about Romine's over-familiarity with inmates to Pafford. Berger was not present when appellant told Pafford about Romine's conduct; rather, appellant informed him that she had complained to Pafford. Berger discussed

Romine's behavior with Pafford on several occasions, but Pafford did not take any action.

Pafford testified that appellant made most of her claims about Romine after Romine filed her complaint about appellant. He also stated that both employees also complained about other issues, such as cleanliness in the clinic. Pafford, Berger and Robertson observed that Romine and appellant did not always get along during their employment. Appellant and Romine testified they tried to work well with each other.

Appellant did not file a written or formal complaint against Romine. The evidence of appellant's complaints about Romine consisted of her personal notes, which were never given to anyone at Sierra, and a memorandum (memo) dated October 24, 1991 from Pafford to appellant and Romine. The memo documented appellant's complaint that Romine gave a neck rub to an inmate, and Romine's denial of the incident, claiming that she was assisting another dentist at the time .

It is unlikely that Romine would wait three years to retaliate against appellant from her only documented complaint. There is no evidence that appellant ever filed a formal complaint against Romine, or that Romine was under investigation for over-familiarity with inmates. Although Berger and appellant complained to Pafford about Romine, Pafford was apparently satisfied that Romine had not engaged in misconduct because Romine was not admonished or

disciplined. Thus, there was no need for Romine to fabricate allegations against appellant to retaliate against her or distract attention away from Romine's alleged misbehavior.

Given the busy nature of the office, and because the dentists must concentrate on the patients, it is not surprising that the dentists did not observe the incidents between appellant and Romine, which lasted several seconds at most. Their failure to see any alleged impropriety does not negate the allegations.

Appellant argued that Youngberg was untruthful because she is a close friend of Romine's. Youngberg acknowledged that she considers Romine a friend. That alone is not reason to discount her testimony, however. Youngberg was a credible witness. She did not support Romine's contentions in several key respects. She did not perceive appellant's conduct in playing with Romine's hair, hugging her, or comments as sexual in nature, while Romine did. Youngberg witnessed four separate incidents. Had she colluded with Romine, it is more likely that she would have claimed to have witnessed all of the incidents, such as the touching of Romine's buttocks and appellant's additional playing with Romine's hair.

Appellant described Garcia as a "parrot personality," who repeated whatever she was told to say by Pafford, Youngberg, and Romine. Garcia testified that her relationships with coworkers are professional, and she does not socialize with any of them. Garcia was a credible witness. She was a disinterested third party. She

simply reported what she observed. She recalled the kiss occurred during the holidays, and believed that it took place between Christmas and New Year's Day. There was no reason for Garcia to have documented the kiss, and she did not report it to anyone. Although appellant was not at work between Christmas and New Year's Day, this fact does not render Garcia's observation suspect.

Appellant contended that the allegations concerning her touching of Romine's buttocks and playing with her hair were defective under *Leah Korman* (1991) SPB Dec. No. 91-04, as not time specific, other than occurring "during 1993." Given the nature of the allegations, the lack of specified dates does not render the allegations fatally defective. The actions occurred between peers. Romine had no reason to document appellant's behavior until May 24, 1994, when she had "finally had enough," and filed a written complaint with her supervisor.

There was no evidence that either appellant or Romine had received training on sexual harassment, how to document it and how to file a complaint. Romine testified that she had filed a sexual harassment complaint against a male superior prior to her service with the state, and acknowledged that she did make notes about his behavior. She did not document appellant's conduct, however, because she did not expect sexual harassment from a female coworker. Although she did make some notes about appellant's

actions, these concerned other harassment that Romine believed she received from appellant.

Romine told appellant not to play with her hair. Appellant continued to do so on at least five to seven occasions in 1993. Two were witnessed by Youngberg.

There were no witnesses to appellant's grabs and pats to Romine's buttocks other than the two employees. Romine testified that the conduct usually occurred in the sterilization room. All witnesses agreed that the room is a very cramped working space. Romine testified that she bumped into a coworker at least once a month there, even though she was careful. Romine did not complain that appellant touched her on the rib cage, perhaps recognizing that appellant was protecting her feet. A pat or grab of the buttocks area with a hand is not designed to keep someone at bay even in a small space, however, and is different than a bump by a body in a cramped space.

The testimony of Romine, Garcia, and Youngberg is credited under Evidence Code section 780, and appellant's denials are discredited under the same standards.[7]

Romine told appellant not to touch her buttocks on some occasions, and kept moving on other occasions. She was visibly

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[7] The following factors are identified: demeanor; character; testimony; capacity to proceed/communicate; bias/interest/motive; prior consistent/inconsistent statement; attitude; admissions of untruthfulness; and existence/nonexistence of facts testified to.

embarrassed when given a bear hug, a kiss, and when appellant made the remark about going to bed with her. Appellant's behavior persisted, despite indications from Romine that her antics were not appreciated. Appellant's touching of Romine's buttocks and hair, hugging her, kissing her, and the going to bed remark were inappropriate in the workplace, unwelcome, and constituted rude and discourteous treatment in violation of Government Code section 19572 (m). Appellant's behavior also constituted other failure of good behavior on duty which caused discredit to the agency in violation of Government Code section 19572 (t). A violation of subdivision (t) requires that the misconduct bear some relationship to appellant's employment and that the misconduct bring discredit to the public service. (*Yancey* v. *State Personnel Board* (1985) 167 Cal.App.3d 478, 486.) Appellant's conduct toward Romine occurred during work hours. The potential that such disrespectful action toward a staff member could be witnessed by inmates was great. Employees cannot be required to work under conditions where they are harassed by other coworkers. Discredit would accrue to CDC and Sierra if the public were aware that its employees harassed one another in such a manner, although knowledge is not required. (*Nightengale* v. *State Personnel Board* (1972) 7 Cal.3d 507, 512-14.)

The Board applies the legal standards set forth under Title VII and the Fair Employment and Housing Act to determine whether

conduct is sufficiently egregious to constitute unlawful discrimination and sexual harassment under Government Code section 19572 (w). (*Robert F. Jenkins* (1993) SPB Dec. No. 93-18.) The inquiry is whether the conduct was sufficiently hostile or abusive to a "reasonable woman" so as to constitute unlawful discrimination. The factors to be weighed in this inquiry include the frequency of the discriminatory conduct, its severity, whether the conduct is physically threatening or humiliating or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. (*Walter L. Masters* (1995) SPB Dec. No. 95-13; *Harris* v. *Forklift Systems, Inc.*, (1993) 126 L.Ed 2d 295.) Instances of offensive behavior must be more than occasional, isolated, sporadic or trivial to be actionable as sexual harassment. (*Clayton Carter* (1994) SPB Dec. No. 94-21; *Theodore White* (1994) SPB Dec. No. 94-20.)

Youngberg did not perceive the bear hug, playing with Romine's hair or appellant's remarks to Romine to be of a sexual nature. Garcia also did not perceive the kiss to be sexual, but given in the spirit of a festive holiday.

Appellant briefly touched Romine's buttocks with her hand on at most 11 occasions during a year and a half. The behavior did not simulate penetration or touching of the genital area. Romine testified that appellant's touching of her buttocks made her feel "raped." The question is whether a reasonable woman would construe

the behavior to be sexual harassment. Romine's reaction to the touching of her buttocks markedly contrasts with her description of the physical contact. The two female witnesses to appellant's other conduct toward Romine also did not construe it as sexual, although Romine certainly did. Their reactions differed from Romine's perception, and indicates that Romine's reaction of "rape" to the touching of her buttocks was an overreaction. It is concluded that a reasonable woman would not have found appellant's harassment to be sexual in nature, but rather as immature behavior designed to upset her.

Romine testified that her blood pressure became elevated because of appellant's conduct. Both Youngberg and Pafford took Romine's blood pressure after Romine filed the complaint, and found it to be above average. Romine's elevated blood pressure reflects the stress inherent in filing a complaint against a coworker. After Romine filed the complaint, she acknowledged that the sexual harassment stopped. She claimed that appellant harassed her in other ways, however. Although that conduct may have contributed to Romine's high blood pressure, it was not charged in the notice of adverse action. Appellant's behavior toward Romine was childish, annoying, and embarrassing to Romine. It was harassment, but not sexual harassment and unlawful discrimination in violation of Government Code section 19572 (w). That charge is therefore dismissed.

Although appellant may have experienced back pain during the investigative interview, it was not established that she lacked the capacity to answer questions. Her union representative was present, and she had 24 hours advance notice of the interview. Appellant denied kissing Romine during the investigation. She denied other charged misconduct in more general terms. She was not asked about the bear hug. With the exception of that incident, appellant was dishonest when she denied that she patted or grabbed Romine's buttocks, kissed her on the lips, played with her hair, and/or asked her to go to bed. Her untruthful statements constituted dishonesty in violation of Government Code section 19572 (f). (*M[redacted] [redacted]. M[redacted]* (1995) SPB Dec. No. 95-01.)

Penalty

The remaining issue is the appropriateness of the penalty. Under *Skelly* v. *State Personnel Board* (1975) 15 Cal.3d 194, the factors for the Board to consider in assessing the propriety of the imposed discipline are the extent to which the employee's conduct resulted in or, if repeated, is likely to result in, harm to the public service; the circumstances surrounding the misconduct; and the likelihood of its recurrence.

Romine acknowledged that after the investigation started, appellant ceased physical contact with her, although she believed that appellant continued to harass her by complaining to Pafford. This misconduct was not charged, however.

Appellant has no prior disciplinary action. Her performance evaluations, and the dentists who work with her attest to her outstanding job performance.

Given that appellant ceased the conduct once apprised of Romine's complaints, the likelihood of recurrence is minimal. The charge of unlawful discrimination and sexual harassment was not sustained. The penalty of a 60 days suspension is therefore too severe, and is modified to a 30 days suspension. The modified penalty is just and proper, and sufficient to establish a record of progressive discipline.

* * * * *

WHEREFORE IT IS DETERMINED that the adverse action of 60 days suspension of appellant Ronda Phillips, effective at the close of business on June 8, 1995, is modified to a 30 days suspension.

Said matter is hereby referred to the Chief Administrative Law Judge and shall be set for hearing upon the written request of either party in the event the parties are unable to agree as to the salary, benefits and interest, if any, due appellant under the provisions of Government Code section 19584.

* * * * *

I hereby certify that the foregoing constitutes my Proposed Decision in the above-entitled matter and I recommend its adoption by the State Personnel Board as its decision in the cases.

DATED: December 1, 1995.

KYMBERLY M. PIPKIN
Kymberly M. Pipkin,
Administrative Law Judge,
State Personnel Board.