BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB Case No. 30719
	)	
ROBERT F. JENKINS	)	**BOARD DECISION**
	)	(Precedential)
	)	
From 3 working days' suspension and official reprimand as a Systems Software Specialist III (Technical) with the Stephen P. Teale Data Center at Sacramento	)	**NO. 93-18**
	)	
	)	July 6, 1993

Appearances: Carolyn R. Chan, Attorney, representing appellant, Robert F. Jenkins; Marybelle D. Archibald, Deputy Attorney General, Office of the Attorney General representing respondent, Stephen P. Teale Data Center.

Before Carpenter, President; Stoner, Vice President; Ward, Member.

DECISION

This case is before the State Personnel Board (Board) for determination after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) in the appeal of Robert Jenkins (appellant), a Systems Software Specialist III [Technical] with the Stephen P. Teale Center (Teale), from a 3 working days' suspension and official reprimand.

The adverse action charged appellant with violations of Government Code section 19572, subdivisions (o) willful disobedience and (w) 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 adverse action alleged that appellant sexually harassed his former girlfriend while he was visiting the Department of Motor Vehicles (DMV) on state business (referred to as the "Lorentz Incident"). It was

also alleged that appellant sexually harassed a fellow Teale employee by asking the employee out to lunch on numerous occasions over a few years (referred to as the "Jiminez incident"). The ALJ who heard the matter found that while appellant's actions were possibly discourteous and "silly", they constituted neither willful disobedience nor sexual harassment.

While the Board did not necessarily disagree with the ALJ's conclusion, the Board believed that a more thorough discussion of the applicable law was necessary to support the conclusion, and therefore rejected the Proposed Decision and determined to decide the case itself, based upon the record, including the transcript, exhibits, and the written and oral arguments. Based upon this review, the Board finds that appellant's actions did not constitute sexual harassment nor willful disobedience and therefore revokes appellant's three days' suspension and official reprimand.

FACTUAL SUMMARY

The Jiminez Incident

Appellant is employed as a Systems Software Specialist III (SSS III) with Teale. At the time of the incident, he had been working for Teale for approximately eleven years and had no prior adverse actions. As part of his job duties as a SSS III, appellant assists persons from other state agencies, including the Department of Motor Vehicles (DMV), with computer-related problems.

During the early fall of 1991, appellant struck up an informal conversation with co-workers Norma Jiminez and Norm Morikawa outside the partition to the personnel office where Ms. Jiminez worked at Teale. During this conversation, appellant asked Ms. Jiminez to have lunch with him. Ms. Jiminez declined. This was not the first time appellant had extended a lunch invitation to Ms. Jiminez; he had extended such invitations on several other unspecified occasions. According to Ms. Jiminez, Mr. Morikawa questioned her during this conversation as to why she would not go out with appellant. Both appellant and Mr. Morikawa denied that Mr. Morikawa said any such thing.

While Ms. Jiminez declined this and all other lunch invitations issued from appellant over the years, she never told appellant to stop issuing the invitations to her or that his invitations were bothering her in any way. Rather, Ms. Jiminez made up excuses each time as to why she could not accept the invitation.

On another occasion, appellant was showing his new car to some co-workers in the Teale parking lot when he saw Ms. Jiminez and Ms. Carol Pennington, Teale's Human Resources Manager. Appellant asked Ms. Jiminez when she was going to go take a ride with him in his new car. Ms. Jiminez politely declined the invitation, providing no explanation to appellant.

Eventually, Ms. Jiminez mentioned to Ms. Pennington that appellant's invitations were bothering her, but indicated that she did not want to file a complaint against him. Ms. Pennington thereafter approached one of appellant's supervisors about the matter and the supervisor in turn spoke to appellant. In response, appellant demanded that an investigation into Ms. Jiminez's allegation be conducted.

Ms. Lauren Ortiz, Teale's Affirmative Action Officer, subsequently conducted an investigation and wrote up a report. In her report, she found that appellant's repeated invitations for lunch could be construed as sexual harassment, but recommended that no action be taken as a result of the allegations. Appellant was given a copy of Ms. Ortiz's report, along with a memorandum from his supervisor asking him to cease all invitations to Ms. Jiminez. Since the investigation took place, appellant has not approached Ms. Jiminez in a social manner.

The Lorentz Incident

At one time, approximately one year and a half before the instant adverse action was taken, appellant was romantically involved with a DMV worker named Deborah Lorentz. The two "broke

up" at that time and, according to appellant, have since remained good friends.[1]

Along with other Teale employees, appellant attended a sexual harassment training course given by Teale in the fall of 1991, prior to the Lorentz incident.

On or about October 14, 1991, appellant spoke with Sally Hitomi of the DMV's Technical Support Services Unit (TSSU) located on the fourth floor of the DMV building. Ms. Hitomi told appellant that years earlier he (appellant) had left some computer manuals in the TSSU office, and that she wanted to know if it would be okay to throw these manuals out. Appellant responded that he could not recall what manuals she was referring to and that he had better come and take a look at them himself before they were thrown out. On October 24, 1991, appellant went to the DMV to check on the status of these manuals, as well as to help out another DMV employee, Roger Wilhelm, with some printer problems.

Upon arriving at the DMV that day, appellant, who was wearing his Teale badge, proceeded to take the stairs to the fourth floor to TSSU. Appellant's former girlfriend, Ms. Lorentz, worked on the fourth floor. Upon arriving at the fourth floor, appellant went

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[1] Testimony was admitted from Ms. Lorentz's co-workers that Ms. Lorentz did not want to be friends with appellant, was upset by his attention, and was attempting to avoid him. However, another DMV co-worker and friend of appellant's testified that he had seen Ms. Lorentz recently having lunch on different occasions with the appellant and attending appellant's softball games after work. Ms. Lorentz did not testify at the hearing.

down the hall to see if his friend and former co-worker, Kevin Wong, was around. He told Mr. Wong that he had some business in TSSU and would be back to visit later. Appellant walked down the hallway to TSSU but could not locate Bruce Sacco, the person who worked with Sally Hitomi and the person who he had come to see about the manuals. Appellant walked back down the hallway for a few minutes before going back a second time to Bruce Sacco's desk. By then, Mr. Sacco was at his desk.

In the course of these trips up and down the hall of the fourth floor, appellant passed Ms. Lorentz's desk (which was "open" to the hallway) approximately four times.[2] According to the appellant, he did not note whether Lorentz was at her desk and did not make any attempt to seek her out in any way.

Ms. Lorentz did not testify at the hearing. However, hearsay evidence was admitted in the form of testimony from Ms. Lorentz's co-workers that Ms. Lorentz was very upset by appellant's presence walking back and forth near her desk. According to her co-worker's testimony, Ms. Lorentz told them that appellant was walking back and forth down the hallway near her desk, shaking a can of soda loudly, rattling his keys in his pocket, and muttering something softly under his breath. Ms. Lorentz told her co-workers that in

[2] Appellant claims Ms. Lorentz's desk is not visible from where he was walking. Respondent contends the desk is visible.

the past, appellant would not leave her alone and that this was just another attempt to bother her. Ms. Lorentz became upset and left for lunch through a back entrance.

Appellant denies that he harassed Ms. Lorentz in any way as he went about his business on October 24, 1991. While he admits that he was carrying a large soda with ice at this time and that shaking items in his hands can be a nervous habit of his, he was not shaking the ice intentionally to get Ms. Lorentz's attention.

After Ms. Lorentz complained to a co-worker about appellant's presence and its emotional effect on her, Ms. Lorentz's supervisor, Ms. Nelson was called over to assist with the matter. Ms. Nelson proceeded to stop the appellant in the hallway as he was walking with Kevin Wong getting ready to leave the building. Ms. Nelson asked appellant for identification and asked what his business was on the fourth floor. Appellant told her he was visiting a friend and showed Ms. Nelson his Teale identification badge. Ms. Nelson, however, testified that appellant had no identification with him when she questioned him, and that is why she summoned a security guard.

The security guard took appellant into another room and questioned him briefly. The security guard testified at the hearing that appellant showed him his driver's license and his Teale badge. Appellant told the security guard that Mr. Sacco could verify that he was on official business at the DMV, which

Mr. Sacco subsequently did. This satisfied the security guard who instructed appellant to finish his business and leave through a different route as his presence was upsetting one of the DMV employees. Appellant was released without an escort.

After leaving the security guard, appellant returned to finish his conversation with Bruce Sacco in TSSU where they chatted for a few minutes longer before appellant left the building. Evidence was also admitted that Ms. Nelson saw appellant again on the fourth floor for a brief time after lunch.

Appellant returned to Teale for the afternoon, but left work an hour early and returned to the DMV building to wait outside for Ms. Lorentz to leave work. Appellant attempted to speak with Ms. Lorentz as she got into her car in the parking lot, but Ms. Lorentz would not speak with him.

Teale charged appellant with willful disobedience and discrimination, including sexual harassment under Government Code section 19572 subdivisions (o) and (w). Teale contends that appellant deserves a three days' suspension and an official reprimand based upon his conduct with Ms. Jiminez and Ms. Lorentz. The charge of willful disobedience appears to be premised upon the fact that appellant was informed of Teale's policy on sexual harassment and later violated that policy.

DISCUSSION

Sexual Harassment

Title VII of the Civil Rights Act of 1964 (42 U.S.C. section 2000e et seq.) prohibits, among other things, discrimination on the basis of sex. Title VII was construed by the United States Supreme Court in Meritor Savings Bank v. Vinson (1986) 477 U.S. 57, to include discrimination on the basis of sexual harassment.

There are two categories of sexual harassment. "Quid pro quo" sexual harassment is defined by the Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcement of discrimination laws, 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. EEOC 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).

The EEOC has issued a memorandum republished in March of 1990 entitled "Policy Guidance of Current Issues of Sexual Harassment" (EEOC Compliance Manual, section 3114.) In that memorandum, EEOC states that the ultimate question is whether a reasonable person would find the challenged conduct to interfere unreasonably with that individual's work performance or create an intimidating, hostile or offensive work environment. The EEOC also takes the position that, unless the conduct is quite severe, a single incident, or isolated incidents of offensive sexual conduct or remarks generally do not create an abusive environment.

The Ninth Circuit has gone a step further in narrowing the scope of when conduct becomes legally offensive to a victim by requiring that the standard by which to judge whether an atmosphere is sufficiently hostile or offensive is not the reasonable person but the "reasonable woman's" point of view. Ellison v. Brady (9th Cir. 1991) 924 F.2d 872.

In Ellison, the Ninth Circuit court broke with the other courts by holding that:

> "...a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." Id. at p. 879.

Also pertinent to the instant case was the Ellison holding that "the required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or

frequency of the conduct." Id. at p. 878.

In addition to the federal law governing sexual harassment, California has enacted its own prohibition against sexual harassment in the Fair Employment and Housing Act (FEHA), Government Code section 12940(h). Section 12940(h) provides that it is illegal for an employer, or any other person, to harass an employee or applicant because of their sex.

In Fisher v. San Pedro Peninsula Hospital (1985) 214 Cal.App.3d 590, the court defined the elements necessary to prove a case of sexual harassment against an employer under section 12940 as follows: 1) plaintiff belongs to a protected group; 2) plaintiff was subject to unwelcome sexual harassment; 3) the harassment complained of was based on sex; 4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and 5) respondeat superior. The court further held that the cases determined under Title VII should be applied in determining 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. 609.

The Jiminez Incident

The Board concurs with the ALJ's Proposed Decision that Teale did not prove a case of sexual harassment as to the Jiminez incident. There is insufficient evidence in the record that

appellant's occasional lunch invitations to Ms. Jiminez at work met the legal threshold for sexual harassment as they alone do not appear to be sufficiently "severe" or "pervasive" to alter the condition of Ms. Jiminez's employment and create an abusive work environment.

There was testimony that Ms. Jiminez was not bothered by appellant's conduct and that she did not wish to file a complaint. Furthermore, there is no evidence in the record that Ms. Jiminez ever told appellant that she was bothered by his invitations or did not want him to ask her to lunch.[3] When appellant became aware that Ms. Jiminez was bothered by the invitations, he immediately requested an investigation into the matter and ceased issuing invitations to Ms. Jiminez.

Moreover, there is insufficient evidence in the record that appellant's several lunch invitations and single invitation to ride in his new car were necessarily "sexual advances" or "verbal conduct of a sexual nature" as required by federal regulations for a sexual harassment claim. The Board assumes that it is not highly unusual for colleagues in state service to have lunch with one

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[3] While the failure of a victim to protest or resist the harassment does not necessarily render the conduct "welcome" [Bundy v. Jackson (D.C. Cir 1981) 641 F.2d 934], Ms. Jiminez's failure to express her discomfort to appellant is relevant as to whether appellant had reason to know that his invitations were bothersome to Ms. Jiminez.

another. Casual and occasional lunch invitations during the business day to a member of the opposite sex, without more, can not automatically be construed to constitute sexual harassment, particularly when the invitor has never been told that the invitations were not welcome.

The Lorentz Incident

Neither does the Board find sufficient evidence in the record to establish that appellant's conduct vis-a-vis Ms. Lorentz constituted sexual harassment.

In his Proposed Decision, the ALJ found that appellant did purposefully walk back and forth near Ms. Lorentz's desk in her presence, shaking his soda with ice and rattling his keys in an effort to gain her attention. He also found that this conduct upset Ms. Lorentz. Accepting these findings as true, we find them insufficient to support an adverse action against appellant on the basis of sexual harassment.

Pursuant to the standard set forth in Ellison v. Brady, supra, Teale has the burden to show that, in the eyes of a "reasonable woman", the conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment.[4] Teale must show that the actions are

[4] Appellant is charged in the adverse action with unlawful sexual discrimination, including sexual harassment, under Government Code section 19572, subdivision (w). We apply the standards set forth in federal and state case law to determine whether appellant has committed sexual harassment. Teale also argues that appellant's actions violated its departmental policy on sexual harassment, which states, in pertinent part: "Sexual harassment is generally defined as unsolicited and unwelcome sexual advances of a severe and/or pervasive nature, be they written, verbal, physical and/or visual, that usually occur when...such conduct or communication has the potential to affect an employee's

more than occasional or minor instances.

Given the fact that appellant and Ms. Lorentz were at one-time romantically involved, which naturally can create an atmosphere of highly-charged emotions, even a year and a half later, it is reasonable to conclude that Ms. Lorentz would be upset by appellant's presence at work and might wish to see him leave her area. While a reasonable woman might become somewhat upset at seeing an old boyfriend stroll back and forth near her desk a few times rattling his keys and soda, we do not believe a reasonable woman would find the conduct in question sufficiently "severe" or "pervasive" to alter the conditions of her employment and create an abusive working environment.

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work performance negatively and/or create an intimidating, hostile or otherwise offensive work environment." We need not address the issue of whether an employer may adopt a sexual harassment policy that establishes behavioral standards more exacting than that set forth in the law. In the instant case, even applying Teale's policy, appellant did not commit sexual harassment as appellant's conduct was neither "severe" nor "pervasive" in nature.

The record reveals that appellant was at the DMV on state business and that the incident in question occurred on only one occasion, lasting only a matter of minutes.[5] Appellant's conduct of possibly trying to get Ms. Lorentz's attention can neither be deemed "severe" nor construed to be "pattern of conduct", elements which might elevate appellant's conduct to the level of "sexual harassment".

Moreover, as with the Jiminez incident, there is insufficient evidence in the record to prove that appellant's actions constituted either "unwelcome sexual advances" or "physical conduct of a sexual nature." Assuming appellant's intentions were to bother Ms. Lorentz by purposefully walking back and forth in front of her desk a few times in and effort to gain her attention, we find this conduct alone, while immature, bothersome and possibly discourteous, does not rise to the legal threshold required to sustain an adverse action based on sexual harassment.

Willful Disobedience

Government Code section 19572, subdivision (o) provides that discipline can be taken for willful disobedience. Willful

[5] While the record reveals that appellant did attempt to talk to Ms. Lorentz after work in the parking lot, adverse action should not be taken on this basis as the record does not reflect what appellant said or intended to say to her. We find that appellant's one attempt to speak with Ms. Lorentz after work does not constitute sexual harassment.

disobedience connotes a specific violation of a command or prohibition. Peters v. Mitchell (1963) 222 Cal.App.2d 852, 862.

The Board finds insufficient evidence in the record to support a finding that appellant's conduct constituted willful disobedience of Teale's sexual harassment policy. Since the Board finds appellant's conduct does not constitute sexual harassment, we conclude that appellant's conduct cannot form the basis of a charge of willful disobedience for violation of Teale's sexual harassment policy.

For the above reasons, the adverse action of a three days' suspension and official reprimand is revoked.

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 and 19584, it is hereby ORDERED that:

1. The adverse action of a three days' suspension and an official reprimand is hereby revoked.

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

3. This matter is hereby referred to an Administrative Law Judge and shall be set for hearing on written request of either party in the event the parties are unable to agree as to the salary and benefits due appellant.

STATE PERSONNEL BOARD*

Richard Carpenter, President
Alice Stoner, Vice-President
Lorrie Ward, Member

*Members Floss Bos and Alfred R. Villalobos were not members of the Board when this case was originally considered and did not participate in this decision.

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on July 6, 1993.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board