UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ROBERT SOLTERO, Appellant, v. UNITED STATES POSTAL SERVICE, Agency.	DOCKET NUMBER NY-0752-96-0282-I-1 DATE: AUG 6 1998

Stuart A. Abramson, Esquire, Sea Cliff, New York, for the appellant.

Robert G. Doyle, Windsor, Connecticut, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

Member Marshall issues a separate opinion.

ORDER

After full consideration, we DENY the agency's petition for review and the appellant's cross petition for review of the initial decision issued on March 20, 1997, because they do not meet the criteria for review set forth at 5 C.F.R. § 1201.115.

We ORDER the agency to cancel the appellant's removal and to substitute in its place a ninety-day suspension effective April 12, 1996. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish this action within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the Back Pay Act and/or Postal Service regulations, as appropriate, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

This is the Board’s final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. § 1201.113(b).

NOTICE TO THE APPELLANT REGARDING FEES

You may be entitled to be reimbursed by the agency for your reasonable attorney fees and costs. To be reimbursed, you must meet the criteria set out at 5 U.S.C. §§ 7701(g) or 1221(g), and 5 C.F.R. § 1201.202. If you believe you meet these criteria, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. Your attorney fee

motion must be filed with the regional office or field office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING
FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

_____
Robert E. Taylor
Clerk of the Board

Washington, D.C.

Separate Opinion of Susanne T. Marshall, Member

Robert Soltero v. United States Postal Service

MSPB Docket No. NY-0752-96-0282-I-1

I am satisfied that the agency placed the appellant fully on notice that he had violated the agency's policies concerning unacceptable conduct and sexual harassment, that the evidence supports the agency's charge, and that removal is a reasonable penalty.

The biting incident occurred on December 16, 1995. In his December 17, 1995 memo to the Postmaster of the Plattsburgh Post Office, the appellant explained the incident of the day before, stating that he had "accidently [sic] teasingly bit [his subordinate] too hard" and claiming that he had "biten [sic] her slightly before teasingly." Initial Appeal File (IAF), Tab 3, Subtab 4k. On December 19, 1995, the City Court of Plattsburgh, New York, entered a temporary order of protection by which the appellant was to stay away from his subordinate at her home and at her place of employment. IAF, Tab 3, Subtab 4i. By letter dated December 26, 1995, the agency notified the appellant that it proposed to remove him. IAF, Tab 1. The agency issued its decision letter on April 2, 1996, after considering the appellant's written responses, his representative's answer, and other evidence, and notified the appellant that it would remove him, effective April 12, 1996. IAF, Tab 3), Subtab 4a. The appellant then appealed to the Board. The administrative judge conducted a hearing on August 20, 1996, and issued his decision on March 20, 1997.

I note that, with its petition for review, the agency has submitted new and material evidence, which postdates the August 1996 hearing. 5 C.F.R. § 1201.115(d)(1). The evidence shows that the subordinate employee filed a criminal complaint against the appellant who was convicted of “Harassment 2 Counts,” fined, and ordered by Judge Ryan of the City Court of Plattsburgh to observe the conditions of a protective order. Petition for Review File, Tab 1. Even without considering this new evidence, however, I find that the agency has supported its charge and imposed a reasonable penalty.

In its notice of proposed removal, the agency referenced its provisions against unacceptable conduct and sexual harassment when it charged the appellant with "biting a

subordinate employee on the shoulder, in a manner which rises to the level of sexual harassment." Initial Appeal File (IAF), Tab 1. This notice adequately informed the appellant of the basis for the agency's removal action: that by his act of biting his subordinate he had violated two sections of the Employee and Labor Relations Manual as well as the USPS Policy on Sexual Harassment. The first, Section 661.53, addresses "unacceptable conduct," including "notorious, disgraceful or immoral conduct, or other conduct prejudicial to the Postal Service." The other, Section 671.13, addresses "sexual harassment," and defines such as “improper and unlawful conduct which undermines the employment relationship as well as employee morale." The policy definition of "sexual harassment" forewarns against "deliberate **or** repeated unsolicited remarks with a sexual connotation **or** physical contacts of a sexual nature that are unwelcome to the recipient. "(emphasis added). IAF, Tab 3, Subtab 41.

The appellant attempts to escape the consequences of his action by setting forth a technical argument that the agency did not charge him "with separate acts of improper conduct, biting or assault and sexual harassment." Petition for Review File (PFR), Tab 10. 1 am satisfied, however, that the charges, while founded on the same incident, "are not interdependent upon each other and each can stand alone as a separate charge." *Brim v. U.S. Postal Service,* 49 M.S.P.R. 494, 497 (1991). The Board has found that a single set of actions can support more than one charge, and the fact that one charge cannot be sustained does not preclude a finding of violation of another section of the rules based upon the same factual scenario. *See, e.g., Walker v. Department of the Navy,* 59 M.S.P.R. 309, 318 (1993). Charges should not be interpreted too narrowly, must be viewed in light of the accompanying specifications and circumstances, and should not be technically construed. *See, e.g., Robb v. Department of Defense,* 77 M.S.P.R. 130, 133 (1998). The technical framing or labeling of the charge should not be viewed as crucial nor should it be fatal to the case, where the agency notified the appellant early on of the circumstances and specifications involved in the proposed agency adverse action, and the appellant had ample opportunity to respond to the charges.

The appellant has admitted the biting, but he has characterized it as "accidental" and argued that his behavior did not rise to the level of sexual harassment. IAF, Tab 3, Subtabs 4d, 4e. I find this argument unconvincing. The circumstances in this case lead me to conclude that the appellant's biting is both unacceptable conduct and prohibited sexual harassment. Although I find that the administrative judge erred in not analyzing the agency's charge as a violation of both policies, I conclude that the agency has shown that the appellant committed the conduct as charged and that removal is reasonable under the circumstances.

The record contains evidence of photographs, showing a large, obvious bruise to the female employee's left shoulder. IAF, Tab 7, Exhibits 4-10. That the appellant, a supervisor, could inflict a bruise that was still obvious after a passage of eight days, if not notoriously disgraceful, is at least prejudicial to the Postal Service, thus rendering it unacceptable conduct under Section 661.53 of the Employee and Labor Relations Manual. It is unacceptable for an employee, especially a supervisor, to engage in conduct violative of basic principles of civilized behavior and to bite another employee. Furthermore, the circumstances of this case belie the appellant's claim that this misconduct was not sexual in nature.

The appellant approached the victim, a subordinate who was in his office on business, and bit her on the shoulder near the nape of the neck. The action was gratuitous and without provocation. Although he denied that the bite was intended to be sexual, the appellant admitted that he had employed the same biting technique with his wife when he "teased" her. Hearing Tape, sides 4, 5. This implies that such intimate conduct, at least with his wife, was sexual in nature. To transfer such conduct to the workplace is without justification. The appellant claimed that previously he had teased and had "slightly" bitten the subordinate; he claimed that the incident at issue was an accidental bite or was the unintended result of a type of "kidding around" that had precedent in the office. IAF, Tab 3, Subtab 4k. The subordinate employee denied any precedential conduct which would explain this behavior. The attempt by the appellant to show that his conduct with his subordinate in a business setting was nonsexual and acceptable, in my view, is woefully inadequate. The appellant's explanations suggest that

he viewed biting as titillating and directed this behavior toward females. Under agency policy, all employees should expect to be free from physical advances and contacts of a sexual nature. IAF, Tab 3, Subtab 41.

There is ample authority to be found in decisions emanating from U.S. Circuit and District Courts, as well as from state courts, which have found actionable discrimination based on sex where the conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65, 106 S. Ct. 2399, 2404-5 (1986). *See also, Campbell v. Board of Regents State of Kansas,* 770 F. Supp. 1479, 1485 (D. KAN. 1991). In *Campbell*, a case involving a single incident of physical contact, consisting of a slap on the "butt," and several other relatively minor incidental contacts and certain verbal statements related to the slapping incident, the defendant claimed that the conduct was not sexual and did not have "much to do with the fact that plaintiff is female." *Id*., at *1486.* But the Court disagreed, stating that: "Wherever else such conduct might be acceptable, a slap on the buttocks in the office setting has yet to replace the hand shake, and the court is confident that such conduct, when directed from a man towards a woman, occurs precisely and only because of the parties' respective gender." *Id.* In the case now before us, the appellant's conduct toward his subordinate was most certainly directed toward her because she was a woman and just as surely created an offensive work environment.

The agency in the case before us charged the appellant with a violation of its internal policies and did not charge the appellant with a violation of Title VII. Nevertheless, it is useful to note that courts also have viewed arguably nonsexual physical aggression by a male superior against a female employee because of her sex as constituting part of a sexually hostile environment in violation of Title VII. The D.C. Circuit, through Judge Skelly Wright, stated:

> We have never held that sexual harassment or other unequal treatment of an employee or group of employees that occurs because of the sex of the employee must, to be illegal under Title VII, take the form of sexual advances or of other incidents with clearly sexual overtones.... Rather, we hold that any harassment or other unequal treatment of an employee or group of employees that would not occur but for the sex of the employee may, if sufficiently patterned or pervasive, comprise an illegal condition of employment under Title VII.

McKinney v. Dole, 765 F. 2d 1129, 1138 (D.C. Cir. 1985), *abrogated in part on other grounds, Stevens v. Department of Treasury*, 500 U.S. 1 (1991).

As can be seen by the *Campbell* decision and others involving single acts of violence, physical conduct is generally considered more severe than verbal conduct. Consequently, a single incident of harassment involving a physical act is more likely to constitute a hostile environment than a single incident of harassment that has no physical component. Sexual Harassment in Employment Law, 1997 Supp., Ch. 4, Page 42, citing *Huitt v. Market St. Hotel Corp.*, 62 FEP Cases 538 (D. Kan. 1993). There is a reverse correlation between the frequency or repetition of the incidents and the severity of a physical assault, i.e., the more severe the action the less need for multiplicity of instances of such conduct to create a hostile or abusive environment. Record evidence that was before the administrative judge shows that the victim's shoulder was still bruised and discolored from the bite after eight days. IAF, Tab 7, Exhibits 4-10.

Under all the circumstances, ample evidence in the record supports the agency's charge. This incident was not the result of anger or in retribution for anything the victim had said or done. It was not for punishment nor was it disciplinary in nature. It was directed to that part of the female anatomy, the shoulder near the nape of the neck, which might well be an area of sexual stimulation in another context. It was an act which was done only because the victim, a subordinate, was a female.

I do not agree with the administrative judge's conclusion that the appellant has excellent potential for rehabilitation because he had a forthright and contrite attitude. I have considered that the appellant had a significant number of years of service and that the agency was aware that he had done excellent work in the past. IAF, Tab 3, Subtab 4a. I also note, however, that the appellant claimed to have teasingly bitten the subordinate prior to this particular incident which, as I have remarked, he attempts to excuse as an accident. IAF, Tab 3, Subtab 4g. Seeking to excuse his behavior in this manner does not represent, in my opinion, either a forthright explanation or any remorse. It is significant that the appellant was a supervisor and therefore held to a higher standard of conduct because he was responsible for maintaining a work environment free

of sexual harassment. *Kirk v. Department of the Navy,* 58 M.S.P.R. 663, 672 (1993). The appellant's supervisory status is of further consideration because of the potential for intimidation and retribution. *See, e.g., King v. Hillen,* 21 F. 3rd. 1572 (Fed. Cir. 1994). After considering the gravity of the sustained conduct and the totality of the circumstances, I find insufficient reason to disturb the agency's penalty selection. *See, e.g., Payne v. U.S. Postal Service,* 74 M.S.P.R. 419 (1997), *aff'd,* 135 F 3d. 776 (Fed Cir. 1998)(Table).

(SIGNED)
Susanne T. Marshall, Member

AUG 6 1998
Date