

**SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT**

**DOUG WAGNER,
Grievant,**

HF No. 18 G, 2002/03

v.

DECISION

**CITY OF STURGIS,
Respondent.**

This matter comes before the Department of Labor based on Grievant Doug Wagner's Petition for Hearing on Grievance filed pursuant to SDCL 3-18-15.2. Terry Hutchison appeared on behalf of Grievant Doug Wagner. John T. Hughes of the Morman Law Firm represented Respondent City of Sturgis. The Department of Labor conducted a hearing on December 22, 2004 via the Dakota Digital Network. The parties were located in Spearfish and the Department in Pierre, South Dakota. Upon consideration of the live testimony given at hearing, the evidence presented at hearing, and the parties' written submissions, Grievant's Petition for Hearing and request for relief is hereby denied.

Issues raised by Grievant:

1. Is the evidence sufficient to meet the definition of sexual harassment in City's Sexual Harassment Policy?
2. Did City violate, misinterpret, or inequitably apply its Sexual Harassment Policy?

Procedural history:

Doug Wagner (Grievant), an employee of City of Sturgis, was disciplined by City of Sturgis (City) for a violation of City's Sexual Harassment Policy. City found that Grievant's action of holding up a sexually explicit photograph in the line of site of a co-worker, among other actions, constituted sexual harassment. It is undisputed that the photograph was of Grievant's male cat with its genitalia clearly displayed in a vulgar manner. The co-worker made a complaint to City. The Sturgis Police Department investigated the complaint at the request of the Public Works Department. A thorough, confidential, and impartial investigation was conducted by an officer with the Sturgis Police Department.

The grievance was heard by the Department Head, who upheld a finding that sexual harassment had occurred and that disciplinary action was appropriate. Subsequently, the duly elected City Council and Street Committees determined that a three-day suspension without pay, a letter to Grievant's personnel file, and a required letter of apology to the victim was appropriate. The duly elected Mayor of City considered and affirmed the discipline as appropriate in light of the incident. Grievant appealed the Mayor's decision to the Department of Labor.

Facts:

The Department finds the following facts by a preponderance of the evidence and testimony presented at hearing:

1. City adopted the Sexual Harassment Policy at issue on October 4, 1993. The relevant portions of the policy state:

The municipality of Sturgis, South Dakota is committed to providing a work environment that is free from discrimination and harassment. To maintain this commitment, the municipality will not tolerate any form of harassment, including sexual harassment.

Under this policy, sexual harassment is defined as behavior of a sexual nature which is unwelcome and personally offensive to its recipient. It is a form of employee misconduct which is demeaning to another person and undermines the integrity of the employment relationship.

Unwelcome . . . verbal or physical conduct of a sexual nature constitutes sexual harassment when:

. . . .

2. Any conduct or communication of a sexual nature has the purpose or effect of substantially interfering with work performance or of creating a hostile, intimidating, or offensive employment environment that may be considered offensive to another employee, including but not limited to:

. . .

-the display of sexually explicit pictures, cartoons, or other materials.

. . . .

Violations of the above stated policy by an employer, supervisor, co-worker, or other employee may be cause for immediate disciplinary action.

2. Grievant possessed a photograph that displayed his male cat's genitalia and anus in a vulgar manner.
3. Grievant took the photograph to work and showed several coworkers, including Gary Anderson, Randy Nohava, and Tanya Neuschwander.
4. Gary Anderson is the Union Shop Steward.
5. Randy Nohava was a supervisor for City in January of 2003 and is now the Public Works Director.
6. Tanya Neuschwander is a secretary with City.
7. Grievant showed the photograph to Nohava some time before January of 2003.

8. Nohava told Grievant that he was “sick S.O.B.” and to “get [the photograph] out of here.”
9. On January 3, 2003, Neuschwander was in the break room attending to her duties of updating the bulletin board when Grievant asked her if she “wanted to see a picture of my cat.” Neuschwander said, “No.” Despite this, Grievant held the photograph up in front of Neuschwander, within a foot of her face, forcing her to view the photograph.
10. Grievant testified at hearing that Neuschwander accidentally saw the photograph when she came into the break room. He stated that he was showing the photograph to Anderson and Neuschwander walked in and saw the photograph.
11. Anderson and Neuschwander both credibly testified that Grievant asked Neuschwander if she wanted to see the photograph.
12. The report of the Sturgis Police Department also contradicts Grievant’s sworn hearing testimony. Grievant told the police officer that he asked Neuschwander if she wanted to see the photograph, not that she “accidentally” viewed the photograph.
13. Grievant’s testimony at hearing was not credible.
14. Neuschwander was offended by the photograph because of its sexual content. Neuschwander described the cat as in a sexually excited state.
15. Neuschwander was also offended because she had previously asked the men to clean up their language when she was present in the break room.
16. The men had all complied with her request except Grievant. Even before he forced Neuschwander to view the photograph, Grievant continued to use language in Neuschwander’s presence that he knew she found objectionable.
17. After the incident with Neuschwander, Grievant showed the photograph to Neuschwander’s mother, Tina Kopp, telling her to ask her daughter, “Did you see Doug’s beautiful cat?”
18. Neuschwander was offended when she found out about Grievant’s visit with her mother.
19. She informed all three of her supervisors on the morning of Monday, January 6, 2003.
20. City conducted its investigation and disciplined Grievant as outlined in the Procedural History.

Other facts will be developed as necessary.

Issue One

Is the evidence sufficient to meet the definition of City’s Sexual Harassment Policy?

Grievance defined:

SDCL 3-18-1.1 defines a grievance:

The term “grievance” as used in this chapter means a complaint by a public employee or group of public employees based upon an alleged violation, misinterpretation, or inequitable application of any existing agreements, contracts, ordinances, policies or rules of the government of the state of South Dakota or the government of any one or more of the political subdivisions thereof, or of the public schools, or any authority, commission, or board, or any other branch of the public service, as they apply to the conditions of employment. Negotiations for, or a disagreement over, a nonexisting agreement, contract, ordinance, policy or rule is not a “grievance” and is not subject to this section.

The Department’s role in resolving a grievance is defined by SDCL 3-18-15.2. SDCL 3-18-15.2 reads, in part:

If, after following the grievance procedure enacted by the governing body, the grievance remains unresolved . . . it may be appealed to the department of labor . . . The department of labor shall conduct an investigation and hearing and shall issue an order covering the points raised, which order is binding on the employees and the governmental agency.

The burden of proof is on the grievant. Rininger v. Bennett County Sch. Dist., 468 N.W.2d 423 (S.D. 1991).

Grievant argues that his discipline was improper for three reasons: “First, the evidence showed that [the coworker] was not forced to view the picture, but, rather, willingly viewed the picture. Second, merely exhibiting a picture of a cat once does not constitute sexual harassment. Third, the Grievant is being treated unfairly and inconsistently.”

Grievant’s first argument is specious. First, Grievant’s testimony at hearing was not credible. Second, the evidence presented at hearing demonstrates that Grievant stood three feet from Neuschwander in City’s break room and asked her if she “want[ed] to see a picture of my cat.” Neuschwander said “no.” Grievant, standing three feet from her, held the photograph out a foot in front of her face. Grievant’s testimony at hearing that contradicted this evidence was not credible. Grievant argues that because Neuschwander “willingly viewed” the sexually graphic content, she cannot claim that the picture offended her. In holding the picture up within Neuschwander’s line of site, Grievant forced her to view the photograph. Neuschwander testified credibly at hearing that she did not willingly view the photograph. Grievant forced Neuschwander to look at the photograph. His action in doing so was unwelcome.

Grievant’s second argument that “merely exhibiting a picture of a cat once does not constitute sexual harassment” is unsupported. Grievant does not take issue with the any connotations given to the photograph, including that the cat appeared to be sexually aroused. Grievant instead argues that the law does not allow one incident to be harassment. Grievant relies upon several United States Supreme Court decisions concerning sexual harassment claims under Title VII. This matter is not a harassment

claim under Title VII. The complaint was made under City's Sexual Harassment Policy. Grievant offers no authority to support his argument that City was required to determine the sufficiency of the evidence under Title VII standards. Grievant does not argue that his actions do not meet City's definition of Sexual Harassment.

Grievant also presented the Department with the South Dakota Division of Human Rights policy on sexual harassment. The Department conducted this hearing to investigate City's action of disciplining Grievant under City's policy. There is no evidence in the record to find that City used the sexual harassment policy of the Division of Human Rights in disciplining Grievant.

Grievant's conduct does demonstrate a pattern of conduct involving Neuschwander. Grievant did not respect Neuschwander's request that the men refrain from using offensive language in the break room. Grievant was aware of Neuschwander's request. Grievant had shown the photograph to at least eight of his coworkers. The police investigation revealed that Grievant had been told that the photograph was "sick." Grievant was aware of the potential impact of showing the photograph to others. Furthermore, Grievant continued the offensive behavior by involving Neuschwander's mother, telling her to ask her daughter "did you see Doug's beautiful cat." Neuschwander testified that Grievant also questioned her regarding her choice of employment. Neuschwander was uncomfortable at work because of Grievant's actions. Grievant's actions were demeaning to Neuschwander and undermined the integrity of the employment relationship.

The evidence is sufficient to show that Grievant committed sexual harassment as defined by City's Policy. Grievant ignored Neuschwander's request to clean up his language. He made her uncomfortable by asking her questions about her choice of employment. He forced his coworker to view a graphic and obscene photograph of his cat's genitalia. Grievant involved Neuschwander's mother. Grievant's action meets City's definition of Sexual Harassment in that it was unwelcome and personally offensive to Neuschwander. His actions were demeaning and they undermined the integrity of the employment relationship.

Grievant has failed in his burden of proof to show that his actions do not meet City's definition of sexual harassment. Grievant has failed in his argument that the federal definition of sexual harassment or the South Dakota Division of Human Rights definition of sexual harassment must be used to analyze his actions in this matter brought before the Department of Labor. The evidence is sufficient to find that Grievant's actions constitute sexual harassment as defined by City's Policy.

Issue Two

Did City violate, misinterpret or inequitably apply its Sexual Harassment Policy?

Grievant alleges that the sexual harassment policy is being applied inequitably to him. This argument fails. Grievant alleges that other acts have taken place that are more

offensive than his “tomcat” photograph¹. Grievant can point to no other applications of City’s Sexual Harassment Policy that involved a formal complaint under City’s Sexual Harassment Policy. Grievant offered no evidence that City failed to implement its Sexual Harassment Policy properly after Neuschwander made her complaint. If Grievant’s argument were taken to its logical application, one would be forced to conclude that City should be banned from disciplining anyone under its Sexual Harassment Policy because there may have been other instances of sexual harassment that did not lead to a complaint or to discipline. Grievant has failed to show any inequitable application of City’s Sexual Harassment Policy.

Grievant’s arguments have failed to sustain his burden of proof. City did not violate, misinterpret or inequitably apply its Sexual Harassment Policy. Grievant’s requests for relief are denied.

City shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within ten (10) days from the date of receipt of this Decision. Grievant shall have ten (10) days from the date of receipt of City’s proposed Findings of Fact and Conclusions to submit objections thereto or to submit its own proposed Findings and Conclusions. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, City shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 14th day of April, 2004.

SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

Heather E. Covey
Administrative Law Judge

¹ These other acts consisted of employees wearing Sturgis Motorcycle Rally sweatshirts demanding “Show Us Your Tits” and the display of “bikini-type” calendars in the break room and a supervisor’s office.