JOHN WILLIAM DOWNS,	BEFORE THE
Appellant	MARYLAND
v.	STATE BOARD
BALTIMORE COUNTY BOARD OF EDUCATION,	OF EDUCATION
Appellee	Opinion No. 02-25

OPINION

In this appeal, Appellant challenges the local board's decision to terminate him from his employment with the local board for sexual harassment of another employee, Jennifer Deems. Appellant maintains that his actions towards Ms. Deems do not constitute sexual harassment, but that, if they do, the sanction of termination is too harsh a penalty for his behavior. The local board has filed a Motion for Summary Affirmance maintaining that its decision is not arbitrary, unreasonable, or illegal. Appellant has submitted a reply in opposition to the local board's motion.

FACTUAL BACKGROUND

Appellant was employed by the Baltimore County Board of Education beginning in 1969 working in various supervisory positions in the local board's maintenance and security departments. Appellant's most recent position was as Supervisor of Security. (Tr. 387, 393). His office was located at the Pulaski Industrial Park which houses the local board's facilities, maintenance, security, and environmental departments. (Tr. 391). Appellant attended sexual harassment training in 1993 and in 2001, and was aware of the local board's policy prohibiting sexual harassment in the workplace. (Tr. 441, 446).

Jennifer Deems was a newly hired employee who was assigned in April 2000 to the Pulaski facility as Assistant Project Manager for Water Quality in the local board's environmental department.[1] (Tr. 21-22). Ms. Deems' responsibilities included management of the water quality at nine Baltimore County public schools that use well water. (Tr. 22). Most of Ms. Deems' work required her to be in the field, however, she spent approximately 12 hours per week in the Pulaski office. Ms. Deems' supervisor was Bob Merrey, Supervisor of Environmental Services.[2] (Tr. 24).

When Ms. Deems first began her job, she often came to work dressed in business attire, which included business suits, skirts, dresses, and slacks. (Tr. 33-34). Ms. Deems soon became the object of remarks from other employees concerning her manner of dress and her appearance.

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[1]This was Ms. Deems first career position following graduation from college.

[2]Appellant had no supervisory authority over Ms. Deems.

(Tr. 35). On one occasion when Ms. Deems came to work dressed in professional attire which included a skirt and high heels, Appellant remarked to another co-worker in Ms. Deems' presence that "[i]f she continues to dress that way, we're going to have to go back to teaching CPR for all the old men around here." (Tr. 404). The frequent comments from the Pulaski employees made Ms. Deems uncomfortable and she eventually began wearing overalls and fleece clothing to the office. (Tr. 34-37).

Not too long after beginning her employment, Ms. Deems discovered on her desk a cartoon from a desk calendar depicting a female wearing skimpy clothing. Ms. Deems' name had been written on the cartoon and the name of the female character was crossed out. (Tr. 39-40). Ms. Deems spent some time trying to determine the source of the cartoon on her desk and eventually found the calendar and the original of the cartoon on Appellant's desk. (Tr. 40). Ms. Deems testified that when she questioned Appellant about the cartoon, he did not say anything in response and just smiled. (Tr. 40-41). When she told Appellant "it wasn't funny," she heard him laugh. (Tr. 41).

Thereafter, during a power outage in July 2000, Ms. Deems became uncomfortable while waiting for the electricity to be restored at the Pulaski office. (Tr. 43-44). The building has few windows and the interior offices, including Ms. Deems', are extremely dark. (Tr. 43, 411). According to Ms. Deems' testimony, Appellant came down to her work area looking for her in the dark and repeating loudly, "Where is Jennifer?" (Tr. 42). When Ms. Deems heard Appellant calling her name, she moved from her area to another employee's office where there were some windows in order to make herself feel more comfortable. (Tr. 42). Ms. Deems testified that she was already uncomfortable with Appellant's presence around her prior to this event. She indicated that she tried hard not to go near him and she tried to prevent circumstances where she and Appellant were the only people present. (Tr. 44).

Another incident occurred during a storm on February 16, 2001, while Ms. Deems was standing at a window in the Pulaski Park building watching a co-worker, Ron Kehne, attempt to start his truck in the parking lot. Appellant approached Ms. Deems, placed his arm around her without invitation, made comments about the rain, and stated that "on a day like this, you just want to be laying down on a blanket, snuggling next to a fire with some bubbly." (Tr. 45-46, 417). Ms. Deems replied that she was married and that she and her husband do not drink alcoholic beverages. (Tr. 46, 419). Ms. Deems was uncomfortable during this transaction. (Tr. 47). Mr. Kehne observed Ms. Deems' discomfort from the parking lot and returned to the building. Appellant removed his arm from around Appellant upon Mr. Kehne's arrival in the area. (Tr. 129).

Approximately one month later during a Saint Patrick's Day celebration at the Pulaski Park location, Ms. Deems had another episode involving Appellant. Appellant testified as follows regarding this encounter:

> On March 16 we were having – it was St. Patrick's Day. They [staff] were celebrating back at Pulaski, and they had Irish coffee and doughnuts. And I had went in and got some coffee, and I had

> walked out. And in the doorway of the kitchen area and out in the hallway area, Dave Gilotty [Building Services Manager] and I were sitting there talking. . . .
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> . . . .
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> . . . people were walking by at the time, coming and going, coming into the area. . . but we just continued to talk. There was a time that Bill Downs had walked in, walked in across the area of the kitchen, grabbed the whipped cream and walked over next to me and stood right up next to me shaking it with – and I'm sorry to use this phrase, but a shit-eating grin on his face.
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> . . . .
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> . . . His look made me feel as if to say do you want to have some fun, and that's the way I took it. It made me feel very cheap, and I felt very uncomfortable, and I thought it was very inappropriate, and it embarrassed me in front of Dave.

(Tr. 47-49, 422). Mr. Gilotty was also upset and angered by Appellant's behavior, characterizing it as "unwelcomed and irresponsible." (Tr. 111-112).

During the time that these various events were occurring, Ms. Deems confided in various co-workers about the incidents. After the episode on Saint Patrick's Day, Ms. Deems reported the incidents to her supervisor, Mr. Merrey. (Tr. 50). Mr. Merrey turned Ms. Deems' complaint over to Johnnie Jackson, the local board's EEO Compliance Officer, who conducted an investigation regarding the allegations of sexual harassment by Appellant. (Tr. 188-192).

Although Appellant denied placing the cartoon on Ms. Deems' desk when questioned by Mr. Jackson, Appellant admitted the comments regarding Ms. Deems' attire, the comments made during the power outage, and the comments to Ms. Deems on the rainy day in February. Additionally, Appellant admitted to the whipped cream incident in March and agreed that his facial gestures and mannerisms could have been construed as being sexually suggestive. (Report of Investigation Results).

Mr. Johnson concluded as follows in his report of the sexual harassment investigation:

> The testimony given by each person interviewed was internally consistent. Although Ms. Deems did not maintain a log of each concerning incident, no evidence was discovered to question the truthfulness of her representations.
>
> The applicable section of Board Policy #4003 to this case defines sexual harassment as "Unwelcome sexual advances, requests for

> sexual favors, and other verbal or physical conduct. . . which create an intimidating, hostile, or offensive work environment."
>
> Based on the investigation, the analysis and observations of others, it is the opinion of this investigator that Mr. Downs engaged in sexually harassing behavior and behaved in a manner at odds with school system expectations. Mr. Downs too often committed actions involving Ms. Deems that were unwelcome and their aggregated effect created for her an offensive work environment.

Mr. Johnson recommended that Appellant receive a letter of reprimand and be directed to report to the Office of Employee Assistance for counseling on appropriate workplace behavior. (Report of Investigation Results).

Mr. Jackson met with the Deputy Superintendent, Christine Johns, to discuss his investigation findings. (Tr. 199). Ms. Johns then met with Ms. Deems who recounted the incidents involving Appellant and urged Ms. Johns to make Appellant's behavior stop. (Tr. 352-353). Ms. Johns testified that based on her meeting with Ms. Deems "it was clear to [her] that not only did it occur, but it was unwarranted, it was sexual in nature, and it got worse as time progressed." (Tr. 353). In her testimony she also noted the fact that Appellant was a supervisor who was required to understand and be able to carry out local board policy. (Tr. 365). Ms. Johns recommended that Appellant be terminated for his conduct.

By letter of May 22, 2001 from Donald F. Krempel, Associate Superintendent, Appellant was notified that he was being terminated from his employment for violating the local board's sexual harassment policy effective May 28, 2001.[3] The letter states, in part:

> In my opinion, the Board of Education has an absolute obligation to protect its employees from sexual harassment. Ms. Deems told me and confirmed to Mr. Jackson that your actions and behaviors were demeaning and humiliating. Every employee has the right to expect to come to work in an environment free of intimidation and fear. Your actions contributed to a hostile and offensive work environment for Ms. Deems.

Appellant appealed his termination to the local board which referred the case to a hearing examiner, Carolyn H. Thaler. Ms. Thaler conducted a full evidentiary hearing at which

[3]Dr. Krempel testified that if he were the decision maker, he would have suspended Appellant because he believed that a sanction more severe than a reprimand but less severe than termination was appropriate in this case. (Tr. 250).

witnesses testified and documentary evidence was presented on Appellant's behalf.[4]

Ms. Thaler determined that Appellant violated the local board's policy on sexual harassment and that Appellant failed to prove that the termination decision was arbitrary, unreasonable, or illegal. In her proposed decision, Ms. Thaler indicated that Appellant was in a supervisory position and was a senior member of the Pulaski office staff. He had attended two sexual harassment training workshops and was aware of the types of unacceptable behavior and of possible consequences. The hearing examiner also noted that Appellant excused his behavior by indicating he was merely joking. Ms. Thaler found that reasoning minds could reasonably reach the same decision to terminate Appellant and that the local board has an obligation to protect its employees from harassment in the workplace. She recommended that his termination be upheld.

In a unanimous decision issued February 12, 2002, the local board adopted the Findings of Fact, Conclusions of Law, and Recommendation of Hearing Examiner Thaler and affirmed the superintendent's decision to terminate Appellant for violating Board Policy 4003 on sexual harassment.[5]

ANALYSIS

In *Livers v. Charles County Board of Education*, 6 Op. MSBE 407 (1992), *aff'd* 101 Md. App. 160, *cert. denied*, 336 Md. 594 (1994), the State Board held that a non-certificated employee is entitled to administrative review of a termination pursuant to § 4-205(c)(4) of the Education Article.[6] The standard of review that the State Board applies to such a termination is that the local board's decision is prima facie correct and the State Board will not substitute its judgment for that of the local board unless its decision is arbitrary, unreasonable, or illegal. *See* COMAR 13A.01.01.03E(1).

Appellant maintains that the local board's decision upholding his termination must be reversed because his behavior did not constitute sexual harassment. He further maintains that if his actions did constitute sexual harassment, the penalty of termination was too harsh, and a less severe sanction should have been imposed.

Overview of Sexual Harassment Law and Local Board Policy

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., prohibits employment discrimination based on sex. Sexual harassment is a form of sex discrimination

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[4]The transcript of the hearing before Ms. Thaler consists of more than 450 pages. Appellant was represented by counsel during the proceedings.

[5]One board member did not participate in the decision.

[6]This provision has been recodified verbatim as § 4-205(c)(3) of the Education Article.

which can be found when the harassment creates a hostile and offensive working environment. For behavior to constitute harassment actionable under Title VII, the harassment must be sufficiently severe or pervasive to alter the conditions of the victim's employment and to create an abusive working environment. *Faragher v. Boca Raton,* 524 U.S. 775, 786 (1998); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). The objectionable environment must be both objectively and subjectively offensive; one that a reasonable person in the victim's position would find hostile or abusive, and one that the victim actually perceives to be hostile or abusive. *Harris v. Forklift Systems, Inc*., 510 U.S. 17, 21-22 (1993). Whether a work environment is sufficiently hostile or abusive must be judged by looking at all of the circumstances, including (1) frequency of the discriminatory conduct; (2) severity of the conduct; (3) whether the conduct is threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with an employee's work performance. *Faragher v. Boca Raton*, 524 U.S. at 787-788.

Consistent with Title VII, the Baltimore County Board of Education has enacted Policy 4003 on sexual harassment. Policy 4003 states that "[s]exual harassment is a form of sex discrimination and unlawful employment practice. Behavior constituting sexual harassment includes any deliberate and/or repeated unwelcomed behavior of a sexual nature, **whether it is verbal, nonverbal, or physical**." (Emphasis in original). The policy indicates that conduct may constitute sexual harassment when "[s]uch behaviors or conduct create an intimidating, hostile, or offensive work environment." Pursuant to Policy 4003, disciplinary action for sexual harassment may include a verbal warning, written warning, suspension/probation, and/or termination.

Appellant's Conduct as Sexual Harassment

Appellant maintains that his behavior and actions do not rise to the level of sexual harassment. While we might agree that each of the incidents when viewed in isolation might not constitute sexual harassment, when viewing the totality of the circumstances in this case, we believe that a reasoning mind could have reached the same conclusion as the local board that Appellant's actions constituted sexual harassment in violation of local board policy.

The conduct at issue here occurred several times over a period of approximately one year and appeared to increase slightly in seriousness as time went on. Ms. Deems was one of the most vulnerable employees at the Pulaski office given her young age and recent employment in her position.[7] While she did not use legal terms of art in her testimony, we find sufficient evidence in the record to conclude that Ms. Deems perceived her work environment as hostile and Appellant's behavior as unreasonably interfering with her job.

For example, during a power outage Appellant's actions caused Ms. Deems to retreat from her own desk area to another employee's office; when Appellant placed his arm around Ms.

[7]Appellant had a daughter approximately the same age as Ms. Deems. *See* Hearing Examiner's Report, p. 15.

Deems and made inappropriate sexual comments in February 2001, Ms. Deems became extremely uncomfortable; and Appellant's sexually suggestive conduct at the St. Patrick's Day gathering not only made Ms. Deems uncomfortable, but embarrassed her in front of other employees. Additionally, Ms. Deems changed her mode of dress in response to comments made by the various employees, including Appellant. Moreover, Appellant's conduct affected Ms. Deems to the extent that she relied on other employees for support and counseling and she regularly went out of her way to avoid Appellant lest she find herself alone with him.

Although he did not supervise Ms. Deems, Appellant held a supervisory position at the Pulaski location. As a supervisor, Appellant was responsible for knowing, following, and carrying out local board policies. Appellant had been to sexual harassment training and was aware of the local board's policy and examples of behavior constituting sexual harassment. *See* local board Policy 4003 and Building Services Training Manual, p.23. Additionally, as a long term employee in a supervisory position, Appellant's actions served as an example to other employees and helped set the tone and atmosphere in the office.

In his opposition to the local board's motion, Appellant attempts to distinguish various cases relied upon by the hearing examiner to support his contention that his conduct did not constitute sexual harassment. While Appellant's conduct may not be as outrageous as some of the conduct in those cases, we believe that reasoning minds can find that Appellant's conduct constitutes sexual harassment under the local board's sexual harassment policy. *See, e.g., Harris v. Forklift Systems, Inc*, 510 U.S. at 21 (Supreme Court noting that the conduct alleged in *Meritor* merely presents some especially egregious examples of harassment which do not mark the boundary of what is actionable under Title VII.). Accordingly, we find the local board's decision that Appellant's conduct constituted sexual harassment is not arbitrary, unreasonable, or illegal.

Termination as Penalty

Appellant further claims that if his conduct were deemed sexual harassment, termination is too severe a sanction in this case based on the nature of his behavior and his lengthy and positive record of employment with the local board. However, based upon our review of the record in this matter and the impact of the sexual harassment on the victim, we disagree. As noted by the hearing examiner, "The Board of Education must protect its employees from harassment, itself from unnecessary litigation, and provide a safe working environment. The Superintendent acted to do so by terminating Appellant's employment."[8] Proposed Decision at 23.

As already indicated, Appellant was a long term employee of the local board in a supervisory position. He had attended two sexual harassment training sessions during the course

[8]The Supreme Court has held that employers can be subject to vicarious liability for hostile environment sexual harassment by individuals in supervisory positions. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

of his employment and was aware that termination is a possible consequence of sexual harassment under local board policy. In this instance, school officials were unconvinced that Appellant's behavior would cease if he continued in his employment based on Appellant's statements and demeanor in response to the charges against him. The hearing officer also perceived this attitude noting, "It is lamentable that the Appellant simply did not appreciate the effect the harassment was having on his victim. Even during his testimony, the Appellant did not indicate that he felt remorse for his harassment of Ms. Deems. He basically excused himself by saying he was only kidding." Proposed Decision at 24.

CONCLUSION

For all of these reasons, we affirm the decision made by the Baltimore County Board of Education to terminate Appellant from employment with the school system.

Marilyn D. Maultsby
President

Philip S. Benzil

Dunbar Brooks

Clarence A. Hawkins

Karabelle Pizzigati

Edward L. Root

Walter Sondheim, Jr.

DISSENT

We believe that Appellant's conduct and actions in this matter constitute sexual harassment of the victim. However, under the totality of the circumstances including Appellant's long-term unblemished record of employment with the Baltimore County Public School System with no other evidence of sexual harassment, we would have imposed a long-term suspension rather than termination.

Accordingly, we dissent.

Reginald L. Dunn
Vice President

JoAnn T. Bell

Walter S. Levin, Esquire

John L. Wisthoff

June 26, 2002