

**THE PUBLIC REVIEW BOARD
INTERNATIONAL UNION, UAW**

APPEAL OF:

JOSH PAIRAN, Member
UAW LOCAL UNION 2277
(Indianapolis, Indiana),
Appellant,

-vs-

CASE NO. 1508

REGION 3, UAW
(THE UNITED AUTOMOBILE, AEROSPACE
AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA),
Appellee.

DECISION

(Issued June 24, 2005)

PANEL SITTING: Prof. Theodore J. St. Antoine, Chairperson,
Prof. Benjamin Aaron, Prof. Janice R. Bellace,
Prof. James J. Brudney, Prof. James E. Jones,
Jr., Prof. Maria L. Ontiveros, and Prof. Paul C.
Weiler.

Josh Pairan argues that International Representative Larry Banghart's decision to withdraw a grievance protesting his termination for sexual harassment lacked a rational basis.

FACTS

Josh Pairan worked at General Products Corporation (the Company) in Angola, Indiana with a seniority date of May 14, 1987, in a bargaining unit represented by UAW Local 2277. The Company has established a sexual harassment policy which defines harassment and advises employees how to respond to it.¹ On March 3, 2003, the Company announced a policy of zero tolerance towards any type of harassment.²

¹ Record, pp. 6-7, 8-11.

² The Announcement states as follows:

"General Products Corporation is committed to maintaining a work environment for all employees that encourages and fosters appropriate conduct with respect for individual values and sensibilities.

On February 5 2004, employee Carol M. White complained to the Company's Human Resource Administrator, Teresa Poling, that she was being sexually harassed by Josh Pairan. Carol White gave the following statement on February 6, 2004:

"On 2-4-04, Josh Pairan either ran his hand or some kind of handle up the inside of my left leg, all the way up to my crotch. On 2-02-04, I was pulling up my pants and my underwear accidentally showed, he said for me to do it again and he would go get some money and put it in my underwear with his mouth. He has made nasty mouth gestures. He has showed me a naked picture of himself. He has also put his groin into my butt several times. All this has happened over the last two years. I am tired of having to put up with this kind of treatment."³

Pairan was placed on suspension on February 5 pending an investigation into White's complaint.

Local 2277 President Dave Ater and Administrator Poling questioned Pairan's co-workers about White's allegations. Employees Candy Wardwell, Dawn Wagner, Melisa Clark, Cathy Ambler and Ruby Johnson all confirmed that Pairan tried to show people pictures of himself naked.⁴ Other employees reported that Pairan made sexual remarks and suggestive facial gestures, or that he described his own sexual activities.⁵ Jeanie Williams wrote:

"He would come into the crib area and seek some kind of counsel to see if I agreed with the therapist he was seeing. He would also relay graphic details of his sexual adventures of the evening or weekend. I would just keep working hoping for the break time buzzer to go off so he would leave."⁶

Any employee who violates this conduct by harassing fellow employees, or visitors to our facilities, will be disciplined up to and including discharge.

General Products maintains a zero tolerance for any type of harassment.

Thank you for continuing to help with these efforts." (Record, p. 22)

³ Record, p. 40.

⁴ Record, pp. 25, 26, 27, 28 and 32.

⁵ Record, pp. 23, 31, 33,

⁶ Record, p. 41.

Dave Biddle gave the following statement corroborating the incident on February 2, 2004, reported by White:

“On Monday, 2/2/04, Carol W. was showing Biddle her waist line and underwear was accidentally showing. And Josh P. saw it and acted like it was a striptease and said, ‘I’ll go get a dollar out of my toolbox.’ Dave Biddle was standing next to Dawn Wagner, Kari Frye and Josh showed them a naked picture of himself. Dave B. said Josh Pairan showed him a picture of a girl in a teddy standing up and Josh on his knees about to display foreplay. Dave B. didn’t want to see that crap.”⁷

Representatives of the Company and the Union met with Pairan in the afternoon on February 9, to hear his response to the allegations against him. Notes from that meeting indicate that Pairan admitted that he had shown other employees pictures of himself naked, but he said that this was meant as a joke.⁸ Pairan stated that he had spanked his friends Leslie Loucks and Vicki Danning on the butt, but that any other touching had been accidental.⁹ The meeting notes indicate that Pairan made the following response to Carol White’s specific complaint:

“Josh stated that a week ago Wednesday, Carol White was bent over and he went to poke her in the butt and missed and the broom handle went between her legs.”¹⁰

Pairan was asked if he put two finders in his mouth and stuck his tongue through them, and he admitted making the gesture. The notes indicate the following response:

“Yes, he had done that but many woman and other males had done the same thing. He also stated that he had seen two female employees acting like they were humping each other.”¹¹

Pairan also acknowledged that he told women in the shop graphic details about his sexual experiences, but he stated that this was what employees talked about when they got bored.¹²

⁷ Record, p. 29.

⁸ Record, p. 69.

⁹ Record, pp. 69-70.

¹⁰ Record, p. 70.

¹¹ Record, p. 70.

¹² Record, p. 70.

In response to questions posed by Human Resource Director Sam Trego, Pairan stated that no one had ever objected to being shown photographs of him naked. The meeting notes report the following:

“Josh said that Carol White & Ruby Johnson had also seen the picture and they both stated they might want to see if it was real. Josh told them his name and address was listed in the book, call him any time.”¹³

The notes indicate that Pairan offered to apologize to these employees for his behavior. He also gave the Company medical releases to talk to his doctor or his therapist. He stated that he had been seeing a therapist for eight years.

On February 10, 2004, Sam Trego, Teresa Poling and Dave Ater conducted a conference call with Carol White concerning the incident with the broom handle on February 4. Notes from that telephone call indicate that White gave the following response to Pairan’s account of the occurrence:

“Carol said it ran from her calf all the way to her crotch. She didn’t feel that was an accident. Carol stated she was not friends with Josh, she treated him like a co-worker not as a friend. She also stated that she was not out to get him fired, she just wanted him to get some help and if he was getting help it wasn’t working.”¹⁴

General Products terminated Pairan for sexual harassment effective February 10, 2004. Local Union 2277 filed Grievance 725 protesting the discharge on February 13, 2004. In support of his grievance, Pairan stated that when he was suspended on February 5, no one would tell him what he had been accused of.¹⁵ He wrote that he called President Ater during his lunch hour on February 6, and asked if Ater knew why he had been suspended. According to Pairan, Ater stated that he knew, but that International Representative Larry Banghart had advised him not to tell Pairan until the investigation was complete. Pairan reported that he finally received information from people in the plant that he had been suspended because Carol White had turned him in for sexual harassment.¹⁶

In a statement submitted in support of his grievance, Pairan once again acknowledged his participation in the incident that prompted White’s complaint against him.¹⁷ He argued, however, that the Company’s policy on sexual harassment indicates

¹³ Record, p. 71.

¹⁴ Record, p. 73.

¹⁵ Record, pp. 90-91.

¹⁶ Record, pp. 100-101.

¹⁷ Record, p. 87.

that if someone does something you regard as sexual harassment, you are supposed to express displeasure to the person immediately and tell him or her that the conduct is unwelcome. He stated that no one ever said to him that his behavior was unwelcome. Pairan wrote:

“I told them that with both things she hadn’t said a word and Trego kept saying that she doesn’t have to and I kept saying the policy says to.”¹⁸

Pairan reported that the Company representatives then gave him a copy of its Sexual Harassment Policy dated May 2, 2002 and the Announcement of zero tolerance for harassment dated March 3, 2003. Pairan claimed that he had never previously seen these documents and that no one from the Union had either. He stated that the only Sexual Harassment Policy he had seen was a two page version dated June 7, 2000.¹⁹

Pairan argued that it was improper for the Company to question employees generally about events that had occurred over the past two years. He maintained that their investigation into Carol White’s complaint should have been confined to what had happened between him and Carol White.²⁰ Pairan insisted that he had always been friends with Carol White. He stated that she was also in therapy and suffered from bipolar disorder, and that this illness may have been what caused her to make the accusation against him.²¹ Pairan reported that President Ater told him that White said repeatedly that she did not want to get him fired, but that Director Trego claimed that they wanted to fire him to avoid future lawsuits. Pairan wrote:

“Someone on the 1st shift approached Carol the morning of February 11th and she told him, ‘Well, I didn’t mean it.’ And he said to her, ‘Well, he didn’t mean it either, and now he’s out of a job.’ And with that she walked away and wouldn’t talk to him anymore. That doesn’t sound like someone who’s going to sue to me.”²²

Pairan argued that the Company’s response to claims of sexual harassment in the past had been to issue a three day suspension.²³

Pairan’s grievance was referred to the third step on March 4, 2004. A third step meeting was conducted on the grievance attended by representatives of the Company,

¹⁸ Record, p. 112-113.

¹⁹ Record, p. 114-115.

²⁰ Record, p. 118-119.

²¹ Record, p. 124.

²² Record, p. 127.

²³ Record, pp. 127-128.

the Local Union and International Representative Larry Banghart. The minutes of that meeting indicate that Banghart attempted to persuade the Company to bring Pairan back on a "Last Chance" basis, but that the Company flatly refused.²⁴ Later on in the meeting, Banghart tried unsuccessfully to persuade the Company to change its position and to reduce Pairan's penalty from discharge.²⁵ On March 16, 2004, Director Trego provided Representative Banghart with a written denial of Pairan's grievance and a refusal to issue a "Last Chance Agreement."²⁶

International Representative Banghart responded to Director Trego on March 23 that the Union was withdrawing Pairan's grievance "under protest."²⁷ Banghart advised Pairan that the Company had given the following response to his grievance at the third step:

"Based on the Company's policy of 'zero tolerance' for any type of harassment in an effort to create a work environment for all employees that encourages and fosters appropriate conduct with respect for individuals' values and sensibilities, the company must discharge Josh Pairan for his actions of sexual harassment on 2-4-04."²⁸

Banghart pointed out to Pairan that he had admitted doing the things that he was charged with doing in the statement he gave in support of his grievance. Banghart advised Pairan that he had withdrawn his grievance because it lacked merit.

²⁴ The Minutes of the March 4, 2004, meeting report the following exchange between International Representative Larry Banghart and Human Resource Director Sam Trego:

LB: Would you consider time out as penalty & bring him back under a "Last Chance Agreement" if he seeks help with issues?

ST: If think the answer is "No." Don't think we need a recess to discuss.

LB: Could you get that back to me in writing ASAP?

ST: Can do." (Record, p. 177)

²⁵ The Minutes report the following discussion:

LB: Is the Company's position on Sexual Harassment Auto Termination?"

ST: No—Based on severity of incidence discipline issued.

LB: Every (sic) send one out for treatment?

ST: Not that I'm aware of.

DA: When you look at History & you believed her over him w/no witnesses.

ST: We do look at History—But based on the incident we felt she was more credible. Based along with personnel files & information we got during investigation.

DA: But on Josh's behalf, the history shouldn't be relevant.

ST: But taking the issue again, with the info rec'd per the investigation we reached the decision we did." (Record, p. 179)

²⁶ Record, p. 181.

²⁷ Record, p. 184

²⁸ Record, p. 185.

Pairan appealed the withdrawal of his grievance to the International Executive Board (IEB) on April 11, 2004. In support of his appeal, Pairan argued that the Local Union President and International Representative Banghart did not handle his grievance properly. He stated that they did not keep him informed of the progress on his grievance and that he had to make long distance telephone calls to them on a daily basis. Pairan complained that the Local had not immediately obtained employee statements on his behalf or investigated the Company's past practice with regard to imposing discipline for sexual harassment.²⁹

After the third step meeting on March 4, Pairan reported that President Ater told him that he did not think Representative Banghart was going to take the case to arbitration. According to Pairan, Banghart told Ater that they only had two employee statements supporting Pairan and that was not enough.³⁰ Pairan stated that he had subsequently learned that the Local had four statements on his behalf. Pairan submitted statements signed by Dave Ater, Dawn Wagner, Cathy Ambler and David Biddle that he had presented in support of his claim for unemployment insurance.³¹ Furthermore, he pointed out that the Company had no witnesses to the event on February 4, 2004.

On September 28, Bob Kinkade and Carl Thul conducted a hearing on Pairan's appeal for the IEB on behalf of the International President. Kinkade and Thul reported that Pairan argued at the hearing that employees who had violated the Company's sexual harassment policy in the past had only received disciplinary layoffs ranging from three to five days. In addition, they wrote that Pairan's attorney pointed out that Carol White had never told Pairan that she found his behavior offensive or told him to stop it.³²

Hearing officers Kinkade and Thul found that President Ater and Representative Banghart had raised all of the issues mentioned by Pairan with the Company, but that the Company had insisted on the right to impose the penalty of discharge for sexual harassment. The hearing officers pointed out that the record did not support Pairan's claim that the Local and International Representatives did not work aggressively to obtain a favorable settlement of his grievance. The hearing officers concluded, however, that in the face of Pairan's own admissions about his behavior, the International Representative's decision to withdraw his grievance was not devoid of a rational basis.³³

²⁹ Record, pp. 191-192.

³⁰ Record, p. 195.

³¹ Record, pp. 224, 225, 226 and 227.

³² Record, p. 234.

³³ Record, p. 235

The IEB adopted the report of hearing officers Kinkade and Thul as its decision. The decision was mailed to Pairan on January 3, 2005. Pairan appealed to the Public Review Board (PRB) on January 30.

ARGUMENT

A. Josh Pairan:

I feel that Local President Ater and Regional Representative Banghart colluded with Management and discriminated against me in the decision to withdraw my grievance. At the hearing on my appeal to the IEB, the hearing officers were abusive and argumentative. They refused to let me present evidence that I felt was important.

President Dave Ater and Financial Secretary Jimmy Holland have talked about my case on the shop floor and encouraged people not to help me. The Company never distributed a copy of its updated, four page sexual harassment policy. Everyone had the two page version from 2000. There was never any training about sexual harassment until after I was fired. As soon as I was terminated, they started having classes. The Company has treated every other complaint of sexual harassment less severely.

The Appeals Committee wrote that I could offer no explanation for Carol White's complaint against me. This is not true. I sent them a copy of a statement signed by Dawn Wagner who is a friend to both of us. She said that White had been fighting with her husband and had experienced a bad night, so that when I touched her with the broom, it was the last straw.

President Ater allowed the Company to obtain statements from many people and most of these had nothing to do with my case. Some are lies. The statement from Ruby Johnson is dated February 5, 2004, and she was in the state of Kentucky on that date. The Company took these irrelevant statements into account in making its decision to terminate me.

B. International Union, UAW:

The hearing on Pairan's appeal started at 9:00 a.m. and concluded at 11:45 a.m. Most of the time was spent hearing appellant's testimony. No one was rude to appellant. At the conclusion of the hearing, he was asked if he had anything to add. He responded that he could talk about this all day. The hearing officers then asked if he had anything new to add and he indicated that he did not.

Appellant conceded that on February 4, 2004, he deliberately touched his co-worker Carol White with a broom handle in order to scare her. White stated that she believed that appellant's act of poking her in the crotch with a broom handle was not an accident. Furthermore, statements given by appellant's co-workers showed that prior to the incident for which he was terminated, he consistently engaged in actions that

amounted to sexual harassment. Appellant argues that these past incidents of sexual harassment were irrelevant, but he is wrong. Appellant's past offensive conduct is relevant to his claim that the incident with the broom handle on February 4 was an accident. Given his previous offensive conduct toward White and other female co-workers, his claim of an accident is highly suspect, if not totally incredible. Deliberate, nonconsensual touching of another person with an object like a broom handle constitutes an assault and battery.

Appellant's argument that his offensive comments and gestures were permissible until an employee told him forcefully to stop is not persuasive. The point of the Employer's sexual harassment policy is to prevent workers from having to put up with this kind of conduct. The case record is clear that the Company had a Sexual Harassment Policy issued on June 7, 2000, and updated on May 2, 2003. On March 3, 2003, the Company issued a written announcement maintaining a zero tolerance for any type of harassment.

Local Union President Dave Ater testified at the hearing conducted on behalf of the IEB that the Company insisted on the right to issue discipline up to and including discharge in cases where sexual harassment was established. In light of Pairan's own admissions about his behavior in the letter he submitted in support of his grievance, the Union had no basis to challenge the Company's decision to terminate him. Representative Banghart's conclusion the Union would not be able to persuade an arbitrator to reinstate Pairan was reasonable and correct and not the product of any collusion with the Employer. The handling of Pairan's grievance was not devoid of a rational basis and the decision of the IEB should be upheld.

C. Rebuttal by Josh Pairan:

The Company did not have a well-established policy forbidding sexual harassment as claimed by the International Union. There was a two page letter regarding sexual harassment that was distributed in 2000. The four page letter that the Company relied on to terminate me had never been distributed. The Company claimed that it had been posted, but none of the Local Representatives had ever seen it.

The Local Union did not concur with Representative Banghart's decision to withdraw my grievance. The Local withdrew the grievance under protest.

I do not believe that Representative Banghart ever read my grievance. He was set to retire at the end of March 2004. I believe that the reason he did not take my grievance to arbitration was that he wanted to clear his desk before retiring.

DISCUSSION

It is the Union's policy to arbitrate discharge grievances of high seniority employees, unless compelling facts excuse it.³⁴ Pairan at the time of his discharge had been employed by General Products Corporation for nearly 18 years and was clearly a high seniority person. In this instance, however, we believe there are compelling facts that support the Union's decision not to present Pairan's grievance to an arbitrator.

There is no foundation for Pairan's claim that the Local and Regional Representatives colluded with Management in the settlement of his grievance. On the contrary, the record shows that the Local Union Representatives worked hard to build a case on Pairan's behalf. The record contains notes from strategy sessions conducted by Representatives of the Local following Pairan's termination on February 10, during which the Union discussed various possible defenses to the charge against Pairan. The record also demonstrates that Local Representatives met with the Company on several occasions to try to get some relief for Pairan.

Unfortunately, the Local Union's investigation only produced more evidence of Pairan's objectionable conduct in the plant. The record demonstrates that the incident on February 4, 2003, which prompted White's complaint against him, took place in the context of constant references to sex and suggestive gestures, descriptions of his sexual adventures to female employees and exposure of naked photographs of himself. Pairan's co-workers' statements reveal that they tolerated Pairan's embarrassing conduct only because they did not want to be responsible for having him fired. Pairan's claim that his gesture with the broom handle had not been intended as a sexual touching is inconsistent with his conduct in general, and therefore, was not credible to the employer.

Pairan points out that he had never been given any warnings about sexual harassment by the Company and that he had not seen the Company's most recent version of its Sexual Harassment Policy or its statement of zero tolerance for sexual harassment in the workplace. He also points out that complaints about sexual harassment in the past had only resulted in three to five-day disciplinary layoffs for the persons charged. He maintains that under the circumstances the penalty of discharge was too severe and that he should have been given another chance.

The progressive discipline appropriate to address minor shop rule violations, however, may not be appropriate in cases where a pattern of sexual harassment has been established, because of the employer's responsibility to its employees to provide an environment free of this kind of harassment. We recently observed in *Sparrow v. UAW Local 1250*, PRB Case No. 1457 (2004), that "the discipline appropriate for sleeping, arguing, fighting or even being intoxicated on the job cannot be compared to the situation where employees are being subjected to racial or sexual harassment."³⁵

³⁴ UAW Administrative Letter, Volume No. 38 – Letter No. 4.

³⁵ PRB Case No. 1457, at p. 9.

We further suggested that lesser penalties may be assessed by the Company even for violations of a policy against sexual or racial harassment where “the alleged verbal abuse and threatening behavior occurred in the heat of some argument connected to the work environment and [where] the sexual or racial content was not intended.”³⁶ In this case, the evidence clearly established that Pairan was constantly annoying his co-workers with behavior that would constitute harassment under either version of the Company’s Sexual Harassment Policy. Once this behavior was exposed, the Company’s position that it had to terminate Pairan to protect itself from future liability was justifiable and there was really nothing the Union could do to save his job.

Our jurisdiction over appeals concerning the handling of grievances is limited to claims that the decisions made with respect to the grievance were improperly motivated or devoid of a rational basis.³⁷ In light of the Company’s adamant refusal to reinstate Pairan, Representative Banghart had to decide whether he could persuade an arbitrator to compel the Company to issue a lesser penalty than discharge. Pairan’s description of his conversation with Representative Banghart shows that Banghart did consider this question, as well as each of Pairan’s proposed arguments in favor of his reinstatement, and that he explained to Pairan the basis for his decision that he could not obtain any lesser penalty through arbitration.³⁸ The International Representative’s conclusion that he could not negotiate any positive settlement of Pairan’s grievance was not lacking a rational basis.

The decision of the IEB is affirmed.

³⁶ PRB Case No. 1457, at p. 9.

³⁷ Article 31, §4(i), if the International Constitution provides as follows:

“GRIEVANCE AND RELATED APPEALS

In any appeal to the Public Review Board, under Section 3(f) of this Article, concerning the handling of a grievance or other issue involving a collective bargaining agreement, the Public Review Board shall not have jurisdiction unless the appellant has alleged before the International Executive Board that the matter was improperly handled because of fraud, discrimination or collusion with management, or that the disposition or handling of the matter was devoid of any rational basis.”

³⁸ Pairan’s statement in support of his appeal describes the following conversation with Representative Banghart:

“...I called him Monday, March 22nd, and he was not interested in anything I had to say. He had his mind made up and that was it. He insisted I sexually harassed that girl and wasn’t interested in my explanation. He said I didn’t have a ‘snowball’s chance in Hell’ of winning at arbitration and if the arbitrator heard of some of the things I’d done, ‘You might as well take that money out in the parking lot and burn it.’ When I told him that the girl I was accused of harassing had done things similar to me, he said she wasn’t the one charged with harassment, I was. When I told him that the company’s termination letter stated that I was only being fired for February 4 period. He said, ‘Well, all that other stuff will come up.’” (Record, pp. 201-202)