

In the Matter of the Arbitration

UFCW, Local 1445

AAA: 01-14-0000-3821  
( [REDACTED] Termination)

and

Massachusetts Sportsservice, Inc. (TD Garden)

Opinion and Award

Appearances: For the Employer- Robert P. Joy, Esq.

For the Union- Alfred Gordon-O'Connell, Esq.

In accordance with the Collective Bargaining Agreement between Massachusetts Sportsservice, Inc. (TD Garden) (hereinafter referred to as the "Employer") and UFCW, Local 1445 hereinafter referred to as the "Union") the undersigned was designated as Arbitrator under the auspices of the American Arbitration Association to hear and decide the following issue:

Did the Company have just cause to terminate the Grievant on March 17, 2014? If not, what shall be the remedy?

A hearing was held on November 10 and 21, 2014 in Boston, Massachusetts at which representatives of the parties appeared. They had full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The parties filed post hearing briefs that have been fully considered.

Background

[REDACTED] (hereinafter "[REDACTED]" or "Grievant") was a premium club bartender at the time of his termination. He had worked in various positions over a period of approximately 24 years. [REDACTED] also works full-

time as an electrician. The evidence indicates that in October 1997 the Grievant received a "1<sup>st</sup> written warning" for "unacceptable behavior toward customer. Use of obscene language toward customer. Refusing customer service." At hearing the Grievant testified that he did not recall the 1997 discipline. In February 2003 the Grievant was terminated. The "disciplinary report" issued to the Grievant stated, "despite repeated instruction, exhibited a poor work attitude in failing to readily cooperate, arguing with a manager using obscene language, amounting to insubordination, in violation of Company Rules and Regulations. His poor, general conduct exhibited by leaving his station during operations, as a result of his argument, is unacceptable. ... ." Although it is unclear as to the reason, it is clear that the Grievant continued his employment with the Employer.

██████████, (hereinafter "██████████") has held the position of HR Manager for two and a half years. She has held HR positions for over eight years. As the Human Resource Manager she is responsible for the overall human resources management at the employer's facility. This includes recruiting, training, employee relations, labor relations, as well as investigations related to complaints. She obtained a professional human resources certification in 2009.

On March 4, 2014 ██████████ received a complaint from employee ██████████ (hereinafter "██████████"). The complaint stated:

March 1<sup>st</sup> 14

Human Resources,

At the end of the Lady Antebellium Concert Jan. 31<sup>st</sup> 2014 ██████████ was having a conversation with 2 girls at his end of the bar. They were talking about mutual friends that they had and chatting. One of the girls asked ██████████ if he was working all nite and his response was (Why do you want to get laid and also said (you don't want to get laid by me I have a small dick). He was half way down the bar putting liquor bottles away. ██████████ and I both heard him say that and there were also 2 guys at the bar trying to get last call who heard him. When they were walking away because we had given last call I heard one of the guys say I'll send an E-mail something in. I did not come to you sooner

because I didn't know if he had sent E-Mail in and we had a week off and I was out of the State. He should not be having conversations of that kind with anyone while working.

In addition, to receiving the written complaint, [REDACTED] met with [REDACTED]. According to [REDACTED], [REDACTED] "basically substantiated everything that is in [the] complaint." [REDACTED] did not take notes during this meeting.

As a result of the complaint and meeting with [REDACTED], she met with employee [REDACTED] (hereinafter "[REDACTED]"),<sup>1</sup> another employee who worked in the premium area. [REDACTED] met with [REDACTED] on March 4 and voluntarily provided her with a written statement. [REDACTED] took notes at this meeting. According to [REDACTED], [REDACTED] told her that he worked at the Lady Antebellium concert and corroborated that two women were at the premium bar asked the Grievant "if he was working all night" and the Grievant responded "why? Do you want to get laid tonight?" According to [REDACTED], [REDACTED] also told her that the Grievant made additional comments with regard to his "private parts being small." [REDACTED] agreed that although [REDACTED] told her that the conversation with the Grievant started when the women asked him if he was working all night that statement does not appear in her written notes. She testified that [REDACTED] also told her that the Grievant picks on [REDACTED] all the time and makes sexually explicit comments to her and about her. In addition, she stated that [REDACTED] revealed that when the Boston Bruins assistant coaches' wives pass the Grievant he makes sexually explicit comments toward them in front of him and [REDACTED]. According to [REDACTED], [REDACTED] also revealed that during Christmas a customer gave him and [REDACTED] a gift and did not give a gift to the Grievant. [REDACTED] testified that [REDACTED] told her that the Grievant was creating an atmosphere of intimidation leading him to decide to bid off the premium stand.<sup>2</sup> She agreed that she did not ask [REDACTED]

<sup>1</sup> [REDACTED] was subpoenaed by the Employer to appear at the hearing and testify. He did not appear to testify.

<sup>2</sup> A review of the typed written statement [REDACTED] gave to [REDACTED] indicates that he did not mention that the Grievant made sexual comments. He did state that he believed that he was working in a "hostile work environment" and characterized the Grievant as "unprofessional and downright rude to customers." He also stated that bartenders have left the area because of the Grievant's behavior" and

about his personal relationship with the Grievant, including whether he was invited to the Grievant's wedding, attended "card night" with the Grievant or worked with the Grievant on fundraising events. Further, she stated that although [REDACTED] denied that he made any sexual comments, she did not ask others who worked with him whether that was true. [REDACTED] noted that [REDACTED] told her that employee [REDACTED] (hereinafter "[REDACTED]") also felt uncomfortable by the Grievant's conduct. The evidence indicates that [REDACTED] "bid off" the stand at some point between the Lady Antebellium concert and [REDACTED] submitting her written complaint to [REDACTED].

[REDACTED] interviewed the Grievant on March 7, 2014. She took notes during that investigatory interview. During the interview she confirmed with the Grievant that he worked on January 31 during the concert. She asked him if he made any remarks that were sexual in nature toward anyone including [REDACTED] or any customers and the Grievant denied making such remarks. The Grievant informed [REDACTED] that he had a great working relationship with all of his coworkers and invited her to speak to each one of them individually. He denied making any statements to the two women at the bar on the night of the concert. [REDACTED] agreed that she did not ask the Grievant whether he was acquainted with the two bar patrons outside of work.

After meeting with [REDACTED] and [REDACTED], the Grievant was suspended pending further investigation. On March 10, 2014, after the Grievant was suspended, [REDACTED] interviewed [REDACTED].<sup>3</sup> With regard to [REDACTED], [REDACTED] noted that [REDACTED] was the first one to mention her name. She agreed that she did not know how many times [REDACTED] worked with the Grievant. However, she stated that it was her belief that she worked with the Grievant to witness some of the behavior. According to [REDACTED], she asked [REDACTED] if she had overheard the Grievant make any remarks that were sexual in nature. [REDACTED] testified that [REDACTED] corroborated that the Grievant had made comments about the Bruins wives that were sexual in nature, as well as telling her that when

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that "the anxiety over current conditions" led him to "bid off the stand."

<sup>3</sup> [REDACTED] was subpoenaed by the Employer to appear at the hearing. She did not appear to testify at hearing.

young, pretty women would walk by the Grievant he would say such things as "I would like to tie her up to a tree and" ... "fuck her brains out." According to [REDACTED], [REDACTED] also mentioned that the Grievant made comments to [REDACTED] about how much she liked the Bruins and he would also say such things as "oh, [REDACTED] likes the Celtics because the Celtics players have big dicks." She also recalled the Grievant singing some song to [REDACTED] about "big dicks." [REDACTED] also indicated that the Grievant would comment on her [REDACTED] weight by saying "why are you" "why the fuck are you so fucking skinny? You look sick." [REDACTED] testified that [REDACTED] told her that she and [REDACTED] had asked the Grievant to stop making such comments and he did not stop. Upon reviewing her notes of the [REDACTED] interview, [REDACTED] testified that [REDACTED] also told her that the Grievant's comments about the Bruins wives included such things as, "she wants me" or "the shit that I would like to do to her." She also recalled being told by [REDACTED] that the Grievant made comments about an individual who worked on the sports desk as a "fucking nigger." According to [REDACTED], [REDACTED] told her that she felt intimidated by the Grievant's behavior.

After interviewing [REDACTED], [REDACTED] conducted a second interview with [REDACTED] to determine whether some of the statements revealed during the investigation made by [REDACTED] were accurate. She took notes at her March 13<sup>th</sup> meeting with [REDACTED]. According to [REDACTED], she asked [REDACTED] whether the Grievant had made any of the sexual remarks to her. [REDACTED] testified that [REDACTED] told her that the Grievant made sexual comments to her all the time and that one time when she and [REDACTED] were talking about the Bruins he made a comment about liking the Celtics because they have "big fat dicks, and that he sings a song that [REDACTED] likes "big fat dicks." [REDACTED] told her that she had asked the Grievant to stop his behavior numerous times. [REDACTED] also recalled that [REDACTED] told her that the Grievant did not make such comments when managers were around. [REDACTED] also told [REDACTED] that the Grievant made comments about [REDACTED] being "fucking skinny." In addition, she corroborated that when the Bruins coaches wives were around the Grievant would make a comment that "he would like to tie her up to a tree and, again, I apologize, fuck your brains out." With regard to comments made by the Grievant when a woman walked passed him, [REDACTED] stated that the Grievant would say "she wants

me" or what he would like to do to the woman. After reviewing her notes, [REDACTED] stated that [REDACTED] told her that the Grievant also made comments about her "liking black guys and big dicks and that [REDACTED] sucks a big fat dick."

[REDACTED] subsequently interviewed [REDACTED], another coworker. [REDACTED] was the employee that bid into the position when [REDACTED] vacated the position. [REDACTED] informed [REDACTED] that she only worked with the Grievant on one or two occasions and that she did not observe any inappropriate statements.

[REDACTED] did not meet with the Grievant after completing the above mentioned interviews. She testified that since the Grievant denied making any sexual comments or any comments of a sexual nature to anybody she did not feel she needed to revisit that situation with him. After completing her interviews, [REDACTED] met with [REDACTED], HR Business Partner. [REDACTED] and [REDACTED] concluded that the Grievant's behavior had violated Company policy and it was determined to terminate the Grievant. The termination notice stated:

On March 7, 2014 you were provided with a full opportunity to present your statement regarding allegations of inappropriate behavior that is sexual in nature displayed towards guests and your colleagues. Further your alleged behavior during working hours has created a hostile working environment for other employees. You denied all of the allegations and were suspended pending investigation conducted by Human Resources. The investigation substantiated that your conduct unreasonably interfered with other associates work performance and created an intimidating, hostile and offensive working environment. Further, your behavior was sexual in nature and it caused other employees to be uncomfortable and offended.

[REDACTED] noted that the Associate Conduct Policy prohibits the use of "rude, obscene, profane, offensive, embarrassing, or abusive language towards coworkers, managers guests or client." She also noted that associates receive the policy along with a full training class and

sign an acknowledgment that that they have received the information.<sup>4</sup>

██████████ has worked in the premium area for 13 years. At hearing ██████████ confirmed that on March 1<sup>st</sup> she reported an incident she observed on January 31<sup>st</sup>. According to ██████████, on January 31<sup>st</sup> she observed the Grievant chatting with two female patrons who asked him if he was working all night and the Grievant responded with an inappropriate remark. At hearing she testified as follows:

Q Yes. What happened that night?

A So I was waiting on two guys at the bar and ██████████ was chatting at the other end of the -- well, I was halfway down the bar, and ██████████ was chatting at his end of the bar where he always is with two girls and they were just chitchatting, and then he came down to past where I was and he was starting to put the liquor bottles away, and one of the girls asked him if he was working all night, meaning are you working until the end of the concert, and he said, "Why? Do you want to get laid? You don't want to get laid by me, I have a small dick."

She stated that the incident was the "straw that broke the camel's back", and she decided to file a complaint. ██████████ testified that she waited until March 1<sup>st</sup> to report the incident because she believed that the "the guys at the bar" that overheard the conversation were going to email the Company. She agreed that the customers did not indicate specifically to her that they would be sending an email but she overheard them make such a comment. In this regard she testified:

And I was waiting on two guys at the

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<sup>4</sup> After the termination of the Grievant, ██████████ received an email dated March 25, 2014 from a Bruin's season-ticket holder regarding the Grievant and the gift that was given to ██████████ and ██████████ and not the Grievant. In part, the e-mail stated that the holiday gift was intended for ██████████ and ██████████ and that they did not take money that was intended for the Grievant. It also indicated that the customer found that the Grievant was "rude, lazy, and downright mean to customers." It suggested that ██████████ should be hired back to the premium area.

time and they kind of looked at each other and they looked at me, and I finished their transaction and I heard one of them say something about sending an e-mail in, and so they left, so that's why I waited, and then I was out of town also

According to [REDACTED], she complained about Grievant in the past, but she is not sure if she mentioned the sexual comments. She testified that she had no personal agenda but was tired of the Grievant's behavior.

According to [REDACTED], when she met with [REDACTED] the first time she was asked about events on the night of the concert. However, during her second meeting with [REDACTED] she was asked about other comments made by the Grievant. In this regard she testified:

A She asked me everything that happened and I told her everything that happened, and then she asked me if there were other sexual remarks that he had ever made before, and that's when I told her that he used to come and stand next to me and sing this song, "[REDACTED] sucks a big fat dick, big fat dick, big fat dick, [REDACTED] sucks a big fat dick all day long" or whatever, and he would just keep saying it to me, and I would tell him to stop, and he just would keep singing it until finally I ignored him, and then he would -- okay, that was that, and he would walk away.

Q All right. Now, you indicated that you had a second interview with [REDACTED]?

A Yes.

Q And tell us about that to the best of your memory.

A Okay. That's when I went in and she asked me if there was any other remarks, and then that's when I told her about the song that he sang to me, about how he would come up to me and say, "Have you ever sucked a dick you didn't like?" He would -- during a Celtics game if black guys would come up to the bar, he would just go, "Oh, let her, [REDACTED] will go wait on them, she likes black guys, she likes the big black dicks."

If the Bruins' wives would come up, he

would -- like after, if one of them ended up talking to him or had a conversation with him, he goes, "Oh, she wants me. Oh, I know she's wants me." And then when one of them, after they walked away or whatever, I remember one time he said that he would like to tie one of them to a Tree and fuck the shit out of her. Just really disgusting remarks.

██████ testified that ████████ was present when the comments about the Celtics players were made by the Grievant. She also believed that ████████ was close enough to hear all of the comments.

According to ████████, she repeatedly told the Grievant to stop the inappropriate comments. She stated that the Grievant made inappropriate comments when managers were not around. ████████ testified that the Grievant was the only one who would make these comments at work. She denied that she made sexual jokes at work. She testified that she never heard ████████ say anything to the Grievant of a sexual nature in "a disgusting manner". However, she testified:

Q Have you ever engaged in conversation with Mr. ████████ and Mr. ████████ about how much money it might take for them to engage in certain unconventional sexual activities?

A I do recall hearing someone say something, if they -- they would -- if they were to sleep with someone for a certain amount of money or whatever.

Q And do you recall Mr. ████████ willingly engaging in that conversation?

A Yeah, I think all three of us were talking about it.

Q Do you recall any specifics about what type of activity particularly Mr. ████████ said that he would be willing to engage in and for how much money?

A No, I just -- no, I don't remember the total amount or whatever, but it was -- no, I don't remember the total amount, just we were having a conversation and someone said, oh, I would sleep with someone for a certain amount of money.

██████ agreed that these conversations took place prior to ██████ going to HR. She stated that she never heard patrons having conversations regarding sexual innuendo because she does not listen to customer's conversations.

According to ██████, the Christmas prior to the January concert, a customer gave her \$200 for taking care of the customer's client and he insisted that ██████ keep it and not share the tip with the Grievant. She noted that she had previously been given gifts by Bruins coach's wives. ██████ agreed that prior to this tips were pooled. She also agreed that the way the Grievant interacted with her after the incident was different than prior to the incident.

██████ also recalled an incident involving the Grievant and floor mats taking place around New Years Day. She described it as the Grievant refusing to get out of her way as she was trying to move mats and her brushing against him as she passed him. She testified that the Grievant formally complained about this to ██████ ██████, the bar manger. She stated that she also formally complained and no action was taken.

According to the Grievant, he was one of the three regular employees at the premium bar along with ██████, and ██████. He noted that an extra bartender would be assigned for some concerts and only two bartenders worked Celtics games. According to the Grievant, he would often let ██████ take extra shifts because the Grievant knew that ██████ had a son in college and was tight on money. The Grievant testified that ██████ had the least seniority, and would get bumped out of shifts if he and ██████ wanted to work a specific shift. He stated that since ██████ had no full time job and wanted to work every possible shift he would take a night off to allow her to work.

The Grievant testified that he has worked with ██████ for approximately five years and ██████ for approximately seven years. He has also known ██████ for ten years. However, he stated that he had only worked with ██████ on two occasions. The Grievant indicated that one of the two shifts he worked with her was not a full shift because he went home sick. Prior to the situation at issue in this case, the Grievant considered ██████ a friend who he spoke to about personal things and socialized with her. Although she was invited to the Grievant's wedding she did not attend the wedding because of work. The Grievant recalled

that [REDACTED] spoke to him about the fact that she had breast cancer and also discussed family issues with him. The Grievant testified that he also considered [REDACTED] a friend. [REDACTED] attended the Grievant's wedding. In addition, the Grievant gave him rides to work, played cards with him, and worked on a charitable fundraising project with [REDACTED]. The Grievant did not have a personal relationship with [REDACTED].

According to the Grievant, the regular clientele at the premium bar consisted of season ticket holders and the wives of Bruins' players. The Grievant was unaware of any complaints about him from the Bruins wives. He stated that customers at the bar typically discussed sports and would often comment about attractive women. The Grievant testified that when attractive women walked by the stand patrons would engage in conversations about the appearance of the women. He also stated that he used swear words at work and that "Just about everybody," used swear words including staff and patrons. Specifically, he noted that [REDACTED] and [REDACTED] used swear words at work. Similarly, he testified [REDACTED] and [REDACTED] "engaged in conversations ... that contained sexual references." The Grievant testified at hearing:

Mr. Arbitrator, it would be every night [REDACTED] and I would have conversations about females walking by. We had this little game that we called "Would ya" where he would look at me if a pretty girl walked by and say, "Would ya"? And if I saw a pretty girl walk by, I would look at [REDACTED] and I would say, "Would ya?" And we continued that throughout the night. It was very common.

...

Q Did those conversations ever run toward the women associated with the Bruin organization?

A Yes.

Q And aside from answering yes or no to the "Would ya" question, would you and Mr. [REDACTED] engage with any further detail about the question of interacting with a female?

A Yes, we did.

Q So how did that go? How would that conversation commence?

A It was just a comment after the

answer.

Q A comment suggesting what?

A That would you have intercourse with her? Would you accept --

Q You can use the words.

A -- oral pleasures from her? We had -- there was really no boundaries.

Q Aside from this "Would ya" game as you've described it, do you recall any other specific conversations of a pointedly sexual nature that included either [REDACTED] or [REDACTED] or both?

A Yes.

Q Can you please describe?

A [REDACTED] actually brought up a proposal to [REDACTED] and it referred to a movie that I think [REDACTED] [REDACTED] was in about the indecent proposal and what type of money it took [REDACTED] to have oral sex with a man.

Q Trono brought that up?

A Yeah.

...

Q And did you hear a little song that Ms. [REDACTED] had testified about?

A Yes, I did.

Q Do you recall that song or a version of that song ever being sung in the workplace?

A Yes.

Q Can you explain for the Arbitrator how it first came up?

A Yes. A customer, a regular customer of ours actually brought it up, and he put my name in it.

Q Suggesting that you wanted to suck a big fat dick or whatever it was?

A Yes. And it was only to get the joke out. I understood what he was trying to do. I didn't take any offense to it at all. I used it with [REDACTED]'s name on an occasion where she was very upset, so I did this foolish dance singing the song to get her to get over whatever it is she was upset about.

Q Do you know as you sit here today what she was upset about?

A I do not. It had something to do with a customer that upset her.

...

Q Did you notice any visible change in her demeanor after you sang that song?

A Sure. She laughed and she gave me a big hug and we went back to work.

Q So at any point prior to these events, the investigation in this case, did Ms. [REDACTED] ever ask you to change the way you were talking?

A No, she never asked myself or [REDACTED].

...

Q At any time did Mr. [REDACTED] ever ask you to change the way you were talking in the workplace?

A No.

The Grievant did not recall a patron hearing him or [REDACTED] playing the "would ya" game. The Grievant stated that he was not aware that any of the Bruins wives were aware of the "would ya" game.

With regard to his interactions with customers on the night of the concert, the Grievant testified that the female customers shared a mutual friend with him. He stated that the female customers asked him to get a drink with him after work, and he replied that he couldn't because he was married and that he would "disappoint" them. Although the Grievant testified that he never specifically mentioned the size of his private parts, he agreed that that is what he meant by "disappointing" the female customers. According to the Grievant, no one told him that they had an issue with this conversation. The Grievant denied that he asked a patron if she wanted to get laid. The Grievant also denied that he said any of the specific things alleged in the complaint at the Lady Antebellium concert. Moreover, he denied ever saying anything of sexual nature about [REDACTED] and the Celtics players. He also denied making any specific comments about the Bruins wives, but agreed that if such statements had been made they would violate the sexual harassment policy. In addition, he denied making comments to [REDACTED] about being too f-ing skinny. He admitted to singing an inappropriate song to Trono once or twice but denied that he sang the song constantly to her. The Grievant acknowledged that he was aware of the sexual harassment policy and understood that the policy included inappropriate jokes. He agreed that the song violated the sexual harassment policy, and agreed it was not something he would have done in front of his family. However, the

Grievant testified that he never heard any complaints about his behavior from management. The Grievant agreed that he was aware that Trono complained about his work ethic, specifically his stock not being set up.

The Grievant stated that did not know why he was being called to meet with [REDACTED]. He testified that at the interview he told [REDACTED] that he had no issue with either of his co-workers. He felt it was unnecessary to bring the Employer into this situation because he felt that he could have worked it out with his co-workers.

According to [REDACTED], at Step 2 of the grievance procedure the Union raised the question of animosity between [REDACTED], [REDACTED] and the Grievant because [REDACTED] and [REDACTED] did not split a holiday gift given to them by a customer. She also recalled that during one of the grievance meetings the Union brought up an alleged incident during which [REDACTED] bumped or pushed the Grievant out of the way when she was trying to place mats on the floor. [REDACTED] stated the first she heard of the "mat" allegation was at the grievance meeting. After being told of the incident, [REDACTED] spoke to the premium bar manager who informed her that he had addressed the situation together with the shop steward and that it was concluded that the matter did not require further follow-up.

[REDACTED] recalled that at a Step 3 grievance meeting the union representative requested some additional time so that he could speak to witnesses. She recalled accompanying the union representative to meet with [REDACTED]. Although [REDACTED] did not stay for the interaction between the union representative and [REDACTED], she did observe that the union representative was with [REDACTED] for no more than "a minute or two." [REDACTED] did not believe that the union representative spoke to [REDACTED].

#### Relevant Contract Provisions

##### Article 20 - Discipline

(a) Subject to the terms and provisions of this Agreement, the right to hire, promote, discharge or discipline for cause to maintain discipline and efficiency, is the sole responsibility of the Company; but no post probationary discharge or discipline shall be made without just cause.

Just cause to mean, among other things, but without limiting same, inefficiency, insubordination, intoxication, persistent or serious infractions of the rules for the conduct of Employees reasonably promulgated by the Company, engaging in a strike or stoppage of work of any kind, slowdown or picketing.

#### Article 21 - Management Rights

(a) Except as specifically abridged by the terms of this Agreement, the operation of the Company's business at TD Garden including, but not limited to, the right to hire, promote, demote, terminate Employees, discipline, suspend, discharge for cause, increase or decrease the size of the work force to meet the needs and conditions of the business, terminate operations or any part thereof, establish and enforce rules and regulations, determine the schedules and/or days of work, determine the size and location of work stations and install labor saving devices or equipment, is vested with Management.

#### D. Relevant Company Policies Anti-Harassment Policy

##### A. PROHIBITED FORMS OF HARASSMENT

Harassment is conduct which makes fun of, belittles or shows hostility or dislike to an individual because of his or her race, color, religion, gender, national origin, age, disability (or perceived disability), marital status, sexual orientation or veteran status, or any other basis protected by applicable law, or that of his or her relatives, friends or Associates, and which: has the purpose or effect of creating an intimidating, hostile or offensive work environment; or has the purpose or effect of unreasonably interfering with another individual's work performance; or otherwise adversely affects an individual's employment opportunities. Harassing conduct includes, but is not limited to, the following: Epithets, slurs, negative stereotyping, degrading comments, or threatening, intimidating or hostile acts (even if claimed to be "jokes" or "pranks" and even if not directed at a particular individual) which relate to race, color, religion, gender, national origin (including, but not limited to, an individual's difficulty in speaking the English language), age, disability (or perceived disability), marital status, sexual orientation or veteran status. . . .

## B. SEXUAL HARASSMENT

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment 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.

For example, the following kinds of behavior, or others with a similar harassing effect, are absolutely prohibited:

1. Abusing an Associate through insulting or degrading sexual remarks, jokes, innuendoes, or other sexually oriented conduct, whether or not directed at a particular individual (including, among other things, graphic or descriptive comments relating to an individual's body or physical appearance, sexually oriented teasing or pranks, improper suggestion, objects, pictures or computer images, or unwanted physical contact). . . .

\* \* \*

After an impartial investigation, if an Associate has been found to have violated this policy, appropriate disciplinary action will be taken, including, but not limited to termination. . . .

TD Garden House Rules and Regulations (Company Ex. 5) Anti-Harassment. . . . Harassment in any form, including but not limited to sexual harassment, will not be tolerated. . . .

\* \* \*

Corrective Action. Corrective action ranging from verbal counseling to suspension and/or termination will be utilized to address attendance, conduct, performance, and all other applicable violations of company policy as they arise. Determination of the appropriate corrective action is the sole discretion of Sportservice.

\* \* \*

Conduct. You are expected to conduct yourself in a professional manner at all times with regard to other associates, management, guests, and all other arena personnel. Failure to do so, including but not limited to, the use of vulgar or inappropriate language, discussion of inappropriate topics, insubordination, or other inappropriate behavior, as determined by management, will be considered a violation of company policy, subject to corrective action up to and including termination. . . . Sportservice "The Company" Work Rules & Regulations

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Section II: Associate Conduct

It is particularly important that all Associates conduct themselves in a professional and appropriate manner to ensure a harmonious work environment. These expectations are applied to Exempt as well as Non-Exempt Associates. The following behavior and/ or actions are prohibited, will not be tolerated and will result in discipline up to and including termination:

- Use of rude, obscene, profane, offensive, embarrassing or abusive language toward coworkers, managers, guests or client . . . .

### Positions of Parties

#### Employer

The Employer argues that it had just cause to terminate the Grievant for a repeated pattern of sexually explicit, offensive, and harassing workplace banter that was unwelcomed by his co-workers. It notes that the Grievant was on written notice of the Company's policies. Moreover, it notes that the Grievant admitted at hearing that he violated company policy when he sang an inappropriate song to Trono.

The Employer notes that the CBA does not explicitly require progressive discipline. Further, it notes that the Grievant knew that termination could occur due to his 2004 discharge for hostile and abusive language. It notes that it has a zero tolerance policy regarding harassment.

The Employer's notes that the "house rules" hold the staff to a "higher standard of courtesy, demeanor, and professionalism" than that which is expected of guests. For example, it points out that the rules prohibit drinking, seeking autographs, and fraternizing with the athletes. Further, it notes that the rules prohibit "vulgar language, discussion of inappropriate topics, insubordination, or other inappropriate behavior." In particular it notes that the rules state that "if you would not want to discuss a topic in the company of your parent, spouse, children, your supervisor, or a court of law, do not discuss it."

The Employer argues that although the Grievant only admitted to singing the inappropriate song, three co-workers rebutted his denial that he made other inappropriate comments. In support of its position, the

Employer points to ██████'s testimony at the hearing. It also notes that it interviewed ██████ who informed the investigator that he heard the Grievant speak to two women at the bar about getting laid and that the Grievant made a comment about the size of his sex organs. ██████ also stated that the Grievant picked on ██████ and made sexually explicit comments about her. It argues that the Grievant would also make sexually explicit comments about the Bruins' wives in front of ██████ and ██████, making ██████ uncomfortable. Similarly, it notes that it interviewed ██████ who indicated that the Grievant would make inappropriate comments about the Bruins' wives such as "she wants me" and "the shit I would do to her." In addition, she noted in her interview that the Grievant said that he would like to "grab" a young patron and "tie her up" She also confirmed that the Grievant indicated that ██████ likes the Celtics because the players have large sex organs and that he would sing a song indicating that ██████ liked large sex organs. Finally, it argues that during her interview ██████ stated that the Grievant referred to another male employee with a racial slur.

Moreover, the Employer notes that it confirmed that the "tip" was meant for ██████ and ██████. Further, it argues that the customer providing the tip indicated that the Grievant was rude and inappropriate. It argues that although it investigated other incidents it was beyond the requirements for such an investigation.

#### Union

The Union contends that in sexual harassment cases it is often not clear what constitutes a hostile work environment. It notes that in the sexually charged atmosphere at the TD Garden determining what type of behavior is tolerated is not always clear. The Union argues that the Grievant was terminated for talking about sex in a sports bar where patrons are often intoxicated and sexual imagery surrounds patrons. In part, it is the position of the Union that the Employer failed to take these facts into account and failed to investigate the work environment to discern whether such behavior was typically tolerated. The Union contends that sexual harassment includes a requirement of intent to abuse and requires an analysis of the working environment. In this regard it notes that "Sports bars typically invite conversations about sex and the Garden participates by putting on

scantily clad C's and B's dancers." It argues that the evidence shows that the patrons engage the staff in conversations of a sexual nature as evidenced by the Lady Antebellum incident. The Union contends that other than ██████'s testimony there is no evidence that any other customers overheard the exchange between the Grievant and the customers. Moreover, the Union argues the Arbitrator should "consider the personal relationships between those involved.

The Union questions ██████'s credibility. It notes that ██████ did not file her complaint until March 4, 2014. It also argues that the Grievant does not recall ██████ ever asking him to stop and there is no evidence that ██████ ever brought her concerns over Grievant's behavior to a superior or human resources prior to filing the complaint in March 2014. Further, it contends that the "victim in this case admitted to occasionally participating in these conversations such as the *Indecent Proposal* conversation," and "██████ further indicated that ██████ engaged in the same conduct, although supposedly not in a disgusting manner." Moreover, it contends that ██████ "did not assert with any certainty that she ever objected to the grievant's behavior."

Although the Union notes that the Grievant "admitted that his conduct may have violated the black letter of company policy," discharge is too harsh a penalty where the policy was either unenforced or laxly enforced. It notes that the Grievant's previous disciplinary record did not include anything related to sexual harassment.

With regard to evidence gathered during the investigation, the Union argues that the method used by the Employer in interviewing the Grievant makes his "failure to own up to his actions understandable." Moreover, it argues that the Arbitrator cannot rely on hearsay attributed to ██████ and ██████ who did not testify. It notes that the Arbitrator ruled that their statements would not come in for their truth. The Union suggests that in ██████'s case, he did not testify because "it likely due to the fact that he would have been forced to admit his participation in the inappropriate conversations." In the Union's view, the allegations against the Grievant were likely motivated by the Grievant confronting ██████ and ██████ about the "tip" given to them by a customer during the Christmas season.

Discussion

The letter of termination issued to the Grievant stated, in part, that the Grievant's conduct "unreasonably interfered with other associates work performance and created an intimidating, hostile and offensive working environment. Further, your behavior was sexual in nature and it caused other employees to be uncomfortable and offended." The Grievant testified that customers at the bar typically discussed sports and would often comment about attractive women. He stated that when attractive women walked by the stand patrons would engage in conversations about the appearance of the women. He also stated that he used swear words at work and that "Just about everybody," used swear words including staff and patrons. Specifically, he noted that [REDACTED] and [REDACTED] used swear words at work. Similarly, he testified [REDACTED] and [REDACTED] "engaged in conversations ... that contained sexual references." The Grievant testified at hearing:

Mr. Arbitrator, it would be every night [REDACTED] and I would have conversations about females walking by. We had this little game that we called "Would ya" where he would look at me if a pretty girl walked by and say, "Would ya"? And if I saw a pretty girl walk by, I would look at [REDACTED] and I would say, "Would ya?" And we continued that throughout the night. It was very common.

Q Did those conversations ever run toward the women associated with the Bruin organization?

A Yes.

Q And aside from answering yes or no to the "Would ya" question, would you and Mr. [REDACTED] engage with any further detail about the question of interacting with a female?

A Yes, we did.

Q So how did that go? How would that conversation commence?

A It was just a comment after the answer.

Q A comment suggesting what?

A That would you have intercourse with her? Would you accept --

Q You can use the words.

A -- oral pleasures from her? We had -- there was really no boundaries.

...

Q And did you hear a little song that Ms. ██████ had testified about?

A Yes, I did.

Q Do you recall that song or a version of that song ever being sung in the workplace?

A Yes.

Q Can you explain for the Arbitrator how it first came up?

A Yes. A customer, a regular customer of ours actually brought it up, and he put my name in it.

Q Suggesting that you wanted to suck a big fat dick or whatever it was?

A Yes. And it was only to get the joke out. I understood what he was trying to do. I didn't take any offense to it at all. I used it with ██████'s name on an occasion where she was very upset, so I did this foolish dance singing the song to get her to get over whatever it is she was upset about.

With regard to the Lady Antebellium concert, the Grievant agreed that on the night of the concert, female customers asked him to get a drink with them after work, and he replied that he couldn't because he was married and that he would "disappoint" them. Although the Grievant testified that he never specifically mentioned the size of his private parts, he agreed that is what he meant by "disappointing" the female customers. He stated that he had a friend in common with the female customers.

Although the Grievant denied: saying anything of sexual nature about ██████ and the Celtics players; making any specific comments about the Bruins wives; making comments to ██████ about being "too f-ing skinny;" and singing the song to ██████ constantly he did agree to engaging in conduct that was clearly inappropriate and agreed that certain of his conduct violated Company policy. Based upon the Grievant's own testimony, it is clear that he engaged in conduct that violated Company policy and commonsense and therefore it would be more than reasonable for an employer to take disciplinary measures to have such conduct cease.

Having determined that discipline was appropriate, the question remains whether, under the facts of this case, termination was appropriate. The termination notice stated, in part, that the Grievant's behavior created an "intimidating, hostile, and offensive working environment." At the outset, consideration must be given to whether the Grievant's comments were made in an environment where similar conduct by co-workers encouraged or at least did not discourage his inappropriate behavior. ██████ stated that the incident at the concert was the "straw that broke the camel's back", and she decided to file a complaint. However, she agreed that she only mentioned the Grievant's conduct at the concert in her initial complaint to management. Moreover, she had no specific recall of having complained about the Grievant's sexual comments prior to the March complaint. ██████ did not raise the Grievant's sexual comments directed to her or others until she was asked about it at a second interview with ██████. It is understandable that a victim of sexual harassment or a hostile work environment is often reluctant to come forward to management with complaints. However, in this case, ██████'s reason for not coming forward was that she thought based upon what she overheard from customers present on the night of the Lady Antebellium concert, that they would notify management of the Grievant's interaction with the two female customers that night.<sup>5</sup> However, the Grievant conceded that the customers were not specific about sending an e-mail and did not ask her for an address to direct such a complaint. Moreover, despite ██████'s testimony that the incident at the Lady Antebellium concert was the "straw that broke the camel's back," it appears that she did not inquire as to whether the complaint was filed until the day she actually filed her complaint, approximately 30 days after the incident. Moreover, although not alone determinative, one has to wonder why ██████ would not have added the Grievant's other conduct to her complaint or at least raised the conduct when she met with ██████ during the first interview if the issue was weighing on her to the degree of creating a hostile work environment.

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<sup>5</sup> It is worthy of note that ██████ stated that she never heard patrons having conversations regarding sexual innuendo because she does not listen to customer's conversations, but testified that she overheard the conversation of customers regarding the Grievant's comments.

Moreover, ██████ stated that she repeatedly told the Grievant to stop the inappropriate comments, and stated that the Grievant was the only one who would make these comments at work. However, she testified:

Q Have you ever engaged in conversation with Mr. ██████ and Mr. ██████ about how much money it might take for them to engage in certain unconventional sexual activities?

A I do recall hearing someone say something, if they -- they would -- if they were to sleep with someone for a certain amount of money or whatever.

Q And do you recall Mr. ██████ willingly engaging in that conversation?

A Yeah, I think all three of us were talking about it.

Q Do you recall any specifics about what type of activity particularly Mr. ██████ said that he would be willing to engage in and for how much money?

A No, I just -- no, I don't remember the total amount or whatever, but it was -- no, I don't remember the total amount, just we were having a conversation and someone said, oh, I would sleep with someone for a certain amount of money.

██████ agreed that these conversations took place prior to her going to HR.

Further, in evaluating the work environment and evaluating the credibility of ██████ and the Grievant, it cannot be ignored that during the course of his employment the Grievant had, at a minimum, more than a work relationship with ██████ and ██████. This is evidenced by ██████ and ██████ being invited to the Grievant's wedding and the Grievant engaging in out of work activities with ██████.

The work setting described above, and the prior relationship between the Grievant and ██████, leads to the question of whether an event took place unrelated to the Grievant's inappropriate language that triggered ██████'s complaint. It cannot be ignored that ██████'s complaint post dates both the "gift/tip" incident and the mat incident. ██████ agreed that the way the Grievant

interacted with her after the "gift/tip" incident was different than prior to the incident. She also recalled an incident involving the Grievant and floor mats taking place around New Years Day. She described it as the Grievant refusing to get out of her way as she was trying to move mats and her brushing against him as she passed him. She testified that she and the Grievant formally complained about this to ██████████, the bar manger, and no action was taken. The timing of the tip/gift incident, the mat incident, and ██████████'s complaint, leads me to conclude that the tip/gift incident triggered the hostility leading to the complaint.

Therefore, although I have concluded that the Grievant engaged in inappropriate behavior deserving of discipline, I am persuaded that ██████████ and ██████████<sup>6</sup> also engaged in making comments that fueled the sexual banter at the stand. Even assuming that they engaged in such conversation to a lesser degree than the Grievant, their conduct did nothing to discourage the Grievant or to raise the tone of civil conversation. If the Grievant's conduct was unwelcome by ██████████ one would think that she would not have participated at any level. The evidence persuades me that the trigger for the hostility at the stand was not the Grievant's behavior on the night of the Lady Antebellium concert, or the Grievant's prior inappropriate comments. I am persuaded by the evidence that the negative environment at the premium stand was triggered by the "gift/tip" incident that took place during the holiday season. This conclusion is reinforced by the mat incident that took place shortly after the gift/tip incident. It simply does not ring true that the Grievant's interaction with customers at the Lady Antebellium concert convinced ██████████ to report the Grievant. Therefore, although the Grievant engaged in inappropriate conduct, based upon the facts in this case, I am not persuaded that the Grievant's conduct created a hostile

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<sup>6</sup> Although not determinative, I cannot ignore the fact that ██████████ and ██████████ did not testify despite being subpoenaed by the Employer. Moreover, it is at least noteworthy that the statement ██████████ identified as ██████████'s typed statement refers to the Grievant as being "unprofessional and downright rude to customers" but makes no specific reference to sexual comments made by the Grievant. Further, although the Employer suggests that ██████████ left the premium stand because of the Grievant's inappropriate conversation and comments, without his testimony at hearing, it seems more likely that he left as a result of the environment created by the "Gift/Tip" incident.

work environment based upon behavior that was sexual in nature.

Having concluded that the Grievant's conduct was of a serious nature justifying discipline, I direct that the Grievant be reinstated without back pay. The termination shall be reduced to a suspension for the period from the date of his initial suspension to the date of his reinstatement. The Grievant shall be reinstated with the seniority he had at the time of his suspension. At the discretion of the Employer, the Grievant may be moved to a non-premium stand upon reinstatement. In directing the above stated remedy, the Arbitrator recognizes the severity of the penalty directed. However, it must be recognized that if the Grievant's conduct had taken place in an environment free of the type of interactions by co-workers described above, and if the complaint against the Grievant was clearly motivated by his inappropriate and unwelcomed comments rather than the "gift/tip" incident, a finding that his comments created a hostile work environment would be appropriate and would have justified termination.<sup>7</sup>

#### Award

The Grievant shall be reinstated without back pay. The termination shall be reduced to a suspension for the period

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<sup>7</sup> In determining the appropriate level of discipline under the specific facts of this case, I have considered the Grievant's prior discipline. The 1997 "1<sup>st</sup> written warning" involved unacceptable behavior toward customer, use of obscene language toward customer, and refusing customer service. At hearing the Grievant testified that he did not recall the 1997 discipline. In February 2003 the Grievant was terminated. The "disciplinary report" issued to the Grievant stated that it was based upon poor work attitude in failing to readily cooperate, arguing with a manager using obscene language, and leaving his station during operations, as a result of his argument. At the outset, it is undisputed that the prior discipline was not introduced as a prior element relied upon in the decision to terminate the Grievant. It was introduced as evidence of notice. It cannot be ignored that the most recent prior discipline pre-dated the instant termination by approximately 11 years. Moreover, and significantly, there is no evidence as to the reason the termination did not stand. The only evidence is that the Grievant continued his employment. Thus, in light of the amount of time that has passed since the 2003 discipline, and the lack of detail about the "termination," I find that those disciplines are of minimal weight in evaluating the appropriate penalty in this case.

from the date of his suspension to the date of his reinstatement. The Grievant shall be reinstated with the seniority he had at the time of his suspension. At the discretion of the Employer, the Grievant may be moved to a non-premium stand upon reinstatement. The Grievant or the Union shall have thirty (30) calendar days from the date of this award to inform the Employer in writing that the Grievant wishes to return to work under the terms of this Award. If such written notice is not received by the Employer, the Grievant shall be considered to have resigned from his employment with the Employer.



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Harvey M. Shrage  
Arbitrator

February 26, 2015