IN THE MATTER OF ARBITRATION	)	
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CLEVELAND-CLIFFS STEEL LLC CLEVELAND WORKS	)	
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and	)	
	)	
	)	
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 979	)	Case 145

Susan Bungard, for the Employer
James Walker, for the Union
Before Matthew M. Franckiewicz, Arbitrator

OPINION AND AWARD

This arbitration proceeding involves the termination of Grievant Vincent Cilenti.

A hearing was held on January 26, 2024 at Cleveland, Ohio. Both parties called, examined and cross examined witnesses, and offered documentary evidence. The Parties agreed to waive the requirement for a decision within two days (Article Five Section I (8) (a) (5)) and agreed that I should issue a decision with full opinion within 30 days.

Contract Provisions Involved

ARTICLE FOUR - CIVIL RIGHTS

Section A. Non-Discrimination

1. The provisions of this Agreement shall be applied to all Employees without regard to:

   a. race, color, religious creed, national origin, handicap or disability or status as a veteran; or

   b. sex or age, except where sex or age is a bona fide occupational qualification; or

c. citizenship or immigration status, except as permitted by law.

2. Harassment based on any of the characteristics as set forth in this Section shall be considered discrimination under this Section.

3. The Company shall not retaliate against an Employee who complains of discrimination or who is a witness to discrimination.

4. There shall be no interference with the right of Employees to become or continue as members of the Union and there shall be no discrimination, restraint or coercion against any Employee because of membership in the Union.

5. The right of the Company to discipline an Employee for a violation of this Agreement shall be limited to the failure of such Employee to discharge his/her responsibilities as an Employee and may not in any way be based upon the failure of such Employee to discharge his/her responsibilities as a representative or officer of the Union. The Union has the exclusive right to discipline its officers, representatives and employees.

6. Nothing herein shall be construed to in any way deprive any Employee of any right or forum under public law.

Section B. Civil Rights Committee

1. A Joint Committee on Civil Rights (Joint Committee) shall be established at each location covered by this Agreement. The Union shall appoint two (2) members, in addition to the Local Union President/Unit Chair and Grievance Chair. The Company shall appoint an equal number of members, including the Plant Manager and the Plant Manager of Industrial Relations. The parties shall each appoint a Co-Chair and shall provide each other with updated lists of the members of the Joint Committee.

2. The Joint Committee shall meet as necessary and shall review and investigate matters involving civil rights and attempt to resolve them.

3. The Joint Committee shall not displace the normal operation of the grievance procedure or any other right or remedy and shall have no jurisdiction over initiating, filing, or processing grievances.

4. In the event an Employee or Union representative on the Joint Committee brings a complaint to the Joint Committee, the right to bring a grievance on the matter shall be preserved, in accordance with the following:

   a. The complaint must be brought to the attention of the Joint Committee within the same timeframe that a complaint must be brought to the First Step 1 of the grievance procedure.

b. The Employee must provide the Joint Committee with at least sixty (60) days to attempt to resolve the matter.

c. At any time thereafter, if the Joint Committee has not yet resolved the matter, the Employee may request that the Grievance Chair file it as a grievance in Step 2 of the grievance procedure, and upon such filing the Joint Committee shall have no further jurisdiction over the matter.

d. If the Joint Committee proposes a resolution of the matter and the Employee is not satisfied with such resolution, then the Union may file the complaint at Step 2 of the grievance procedure, provided such filing is made within thirty (30) days of the Employee being made aware of the Joint Committee's proposed resolution.

Section C. Workplace Harassment, Awareness and Prevention

1. All Employees shall be educated in the area of harassment awareness and prevention on no less than a yearly basis.

2. A representative of the Union's Civil Rights Department and a representative designated by the Company's Labor Relations and/or Human Resources Department will work together to develop joint harassment and prevention education, with input from the plants and Local Unions.

3. Within six (6) months of the Effective Date of this Agreement, members of the Joint Civil Rights Committee will be trained in matters relative to this provision.

4. All new Employees (and all Employees who have not received such training) will be scheduled to receive two (2) hours of training as to what harassment is, why it is unacceptable, its consequences for the harasser and what steps can be taken to prevent it.

5. All Employees shall be compensated in accordance with the standard local plant understandings for time spent in training referred to in this Section.

ARTICLE FIVE - WORKPLACE PROCEDURES

Section I. Adjustment of Grievances

8. Rules for Hearings

a. The parties agree that the prompt resolution of cases brought to arbitration is of the highest importance. Therefore, except as provided in paragraph 8(b) below, arbitration hearings shall be heard in accordance with the following rules:

(1) the hearing shall be informal;

(2) no briefs shall be filed or transcripts made;

(3) there shall be no formal evidence rules;

(4) the arbitrator shall have the obligation of assuring that the hearing is, in all respects, fair;

(5) the arbitrator shall issue a decision no later than two (2) days after the conclusion of the hearing. The decision shall include a brief written explanation of the basis for the conclusion; and

(6) the board shall adopt such other rules as it deems necessary.

e. The Company agrees that it shall not, in an arbitration proceeding subpoena or call as a witness any bargaining unit Employee or retiree. The Union agrees not to subpoena or call as a witness in such proceedings any non-bargaining unit employee or retiree.

9. Suspension and Discharge Cases

b. Justice and Dignity

(2) This Paragraph will not apply to cases involving offenses which endanger the safety of employees or the plant and its equipment, including use and/or distribution on Company property of drugs, narcotics and/or alcoholic beverages; possession of firearms, or weapons on Company property; destruction of Company property; gross insubordination; acts of workplace harassment; threatening bodily harm to, and/or striking another employee; theft; or activities prohibited by Article Five, Section K (Prohibition on Strikes and Lockouts).

e. Should the arbitrator determine that an Employee has been suspended or discharged without just cause, the arbitrator shall have the authority to modify the discipline and fashion a remedy warranted by the facts.

Section J. Management Rights

The management of the plants and the direction of the working forces, including the right to hire, transfer and suspend or discharge for proper cause, and the right to relieve employees from duty, is vested exclusively in the Company.

In the exercise of its prerogatives as set forth above, the Company shall not deprive an Employee of any rights under any agreement with the Union.

The Facts

Grievant Vincent Cilenti was employed by the Company for over 45 years prior to his discharge, which is the subject of the current arbitration. His classification was Maintenance Technician Electrical (MTE). Prior to 2023 Grievant Cilenti had never been disciplined by the Company at all.

In October 2023 the Company received a complaint from an employee that on October 6, 2023 Grievant told the employee "I'll kick your ass and shove your head down your neck" and that on October 8, 2023 Grievant told this employee over the phone "hit the door or 204 by Wednesday," which the employee regarded as a threat. On October 13, 2023, Supervisor Henry Cuevas submitted a report stating that he had given Grievant Cilenti an assignment at around 7:30 a.m. but by 10:45 nothing had been done and he tried to reach Cilenti four times by radio but got no response. Cilenti returned the call and told Cuevas that he would do it his way. Cuevas told Cilenti to meet him at noon, but Cilenti said that he would not be finished with lunch by then. According to Cuevas' report, Cilenti went on to say that he would talk to a Manager and get Cuevas fired, and at around 1:15 Cuevas and another Supervisor spoke with Cilenti and Cilenti said that Cuevas was getting fired tomorrow and the other Supervisor was in charge, and then walked away.

English is not Cuevas' first language, which is apparent from the report summarized in the preceding paragraph.

The Company conducted an investigation, and Cilenti characterized Cuevas as "unintelligible."

After the completion of the investigation, the Parties entered into a last chance agreement. The agreement is headed LAST CHANCE AGREEMENT ("L C A"), and states in its entirety:

> On October 8, 2013, Cleveland-Cliffs, Cleveland Works ("the Company") received a complaint from a coworker of Grievant Vince Cilenti. This complaint indicated that Grievant called him on the landline in the 111 substation, was rude, and made threatening comments to him. Grievant acknowledged making the call although the facts of the call were disputed there was acknowledgment from Grievant on claiming that he indicated to the complainant that "something was going to happen in 4 weeks".
>
> On October 13, 2023, the Company received a second complaint about Grievant. This complaint came from a manager in the High Energy department who indicated that he gave Grievant an assignment on the morning of October 13, 2023, and, after several hours, none of the work was done. When Grievant was confronted about it, he told the manager that he would come to see him after he finished his lunch. The manager also indicated that Grievant refused to respond to him when he was called at least four times on the radio.
>
> Later, on October 13, 2023, Grievant was sent home for violating the Cleveland Plant Rules pertaining to harassment and threats against other employees. He was told not to return to work until a meeting was held with Labor Relations. Per the Basic Labor Agreement ("B L A"), he was denied Justice and Dignity ("J & D"). Grievant was interviewed on October 18, 2023 about the October 13, 2023 incident and denied the allegations. The witness confirmed that Grievant had the supplies he needed in a timely manner. Grievant acknowledged using phrases such as "unintelligible" referring to his manager.

On October 24, 2023, the Company received the Union's (the "Union") grievance #2044 on Grievant's behalf. After discussions with the Union, the Company agrees to allow Grievant to return to active employment under the terms of this Last Chance Agreement ("L C A") as follows:

1. Grievant's discipline shall be for time served for the violations of the Cleveland Plant Rules and is for cause. Grievant may return to work on his next scheduled shift after signing the L C A.

2. If there is objective evidence of any irrational behavior in the workplace or not immediately completing tasks as directed by management, by Grievant, the Company will immediately suspend Grievant with intent to discharge.

3. This L C A shall be for twelve (12) months from the date of reinstatement. Any time off for layoff, continuous Family Medical Leave, Sickness and Accident leave, Workers' Compensation leave, or any other Company-approved leave of absence shall be added to the twelve-month period.

4. This L C A is without precedent or prejudice to either Party's position and cannot be relied upon in whole or part to support either Party's position relative to any other grievances and/or Employee issues between the parties.

5. This L C A shall fully resolve this matter.

The above portion of the last chance agreement is signed on behalf of the Company and the Union. The following additional two paragraphs are over the signature of Grievant Cilenti:

Vince Cilenti: By signing below, you agree that you: 1) have read this entire L C A; 2) have consulted with the Union; 3) have signed the L C A knowingly and willingly; 4) accept the conditions of the L C A; and 5) agree to fully abide by the provisions/conditions in it. Failure to abide by ANY of the terms of this L C A shall be considered a material breach and shall result in discipline up to and including discharge. Any suspensions under this L C A will be without J & D.

I have read the above and understand what is required of me to retain my employment. I agree to fully abide by the provisions set forth herein.

At the request of the Grievant and the Union the Company agreed to move Cilenti from High Energy to #1 Steel Producing, in order to afford him a fresh start. His first day in #1 Steel Producing was October 30, 2023.

On November 3, 2023 the Company issued Grievant Cilenti a written warning. It states:

On Monday, October 30, 2023, you were transferred to #1SP. That morning you met with Janis Gribble, the division administrator. While speaking to her you made several inaappropriate [sic] comments regarding another female employee. You asked Ms Gribble

> "where is the pretty girl?" referring to Michelle Ervin-Miller. You then commented that it is a good thing that "I'm not twenty years younger or she's not twenty years older." Ms Gribble told you that your comments were inappropriate and you told her, "I'm just stating that I thinks [sic] she's attractive but I'm happily married." These comments have no place in a work environment. You violated the following plant rules: "An Employee who engages in sexual ... harassment of another Employee ... shall be subject to discipline, including suspension and discharge" and "An Employee who intimidates or threatens a fellow Employee shall be subject to immediate suspension and discharge." [ellipsis original]

Thereafter the Company received a handwritten complaint from a female employee dated December 7, 2023. The complaint is signed by the employee and states in its entirety:

> Had conversation with Vinnie regarding some work tools and [illegible] and he kept saying "I'm not using Chink tools" "The Chinks made garbage." He proceeded to say when he was in high energy he had/has some tools there that are American made, he said that was before that "little Juan Valdez was a problem". I informed him I did not like that type of talk and not to talk like that around me.
>
> A few days later Vinnie again went off on a tangent using the same ethnic slurs "Chinks & Juan Valdez". I stopped him and told him do not talk like that in front of me. He stated I had no right to take his freedom of speech. I told him he was correct I don't if he chose to talk about not liking Chinese people or Hispanic people. But I do have a right if he is using racial slurs, and to not speak like that to me.
>
> Move forward a few days and we were in our morning meeting and Vinnie start complaining again using the term "Juan Valdez"! I spoke up and said stop saying that in front of me and he said he could say what he wanted. At that time he started again and I yelled "Stop saying that in front of me." Rich Anderson told him to stop. I then asked that they get a Union Rep to take care of this.
>
> Michelle Miller came into our break room to drop off supplies to Ken Branning. Vinnie asked if she got the note from Rich Nagg. She stated she had not. Vinnie said "I've been trying to get hold of you and I can't find you in the phone book." She asked what phone book and he said the AT&T phone book. She said "I'm not in that book." He said "well can I have your phone number." I said to Vinnie you're not allowed to talk to her and you can't ask her that. "He said why not". Michelle said "Vinnie you can have my work number for safety concerns, but it is only for for [sic] issues"
>
> Vinnie started talking to me about political views and what the Chinese have done to thousands of people. I stopped him and told him he is not to talk to me unless it is work related and I won't engage in anything else with him.

Michelle Miller, referenced in the statement, is the same individual referred to in the November 3, 2023 written warning.

The Company interviewed Cilenti with respect to the allegations in the statement. He asserted that he used the term "Chink" in reference to tools and not a person and that everyone referred to Henry Cuevas as Juan

Valdez. He stated that he wanted Miller's contact information in order to provide her with investment information.

By letter dated December 19, 2023, the Company suspended Grievant with intent to discharge. The letter states:

> This letter is to inform you that, effective December 7, 2023, you were suspended with intent to discharge. You have violated your Last Chance Agreement (L C A) dated October 26, 2023. You also violated the following section of the "OneCliffs Way of Doing Business: Our Code of Business Conduct and Ethics" as well as several Plant Rules."
>
> > NO TOLERANCE FOR HARASSMENT OR INTIMIDATION
> > We all have a right to work in an environment where everyone is treated with dignity, fairness, and respect. To maintain a positive work environment, we must each do our part to keep our workplace free of harassment. Harassing, intimidating, and bullying our fellow employees is simply not tolerated at Cliffs. Such behavior includes remarks, gestures, or conduct relating to a person's race, color, religion, gender, age, mental or physical disability, veteran status, national origin, sexual orientation, or any other characteristic protected by applicable law.
> >
> > ... Non-sexual harassment may include offensive comments, jokes, or pictures related to any of the topics listed above...
> >
> > In order for us to create and maintain a positive and productive workplace we must not only refrain from harassing or intimidating conduct, we must also promptly report any such behavior we observe or experience.
>
> You have also violated the following Plant Rules:
>
> - Any Employee who intimidates or threatens a fellow Employee or member of Management will be subject to immediate suspension and discharge.
> - Any Employee engaging in sexual or other forms of harassment of another Employee or found displaying material of a sexual nature on Company property shall be subject to discipline, including suspension and discharge.
>
> Either of the above violations, by itself, may result in discharge.

By letter dated January 22, 2024 the Company converted the suspension with intent to discharge into a discharge.

The last training conducted regarding civil rights and harassment was by the Company's predecessor in around 2017.

At the arbitration hearing Grievant Cilenti testified that he intended the "pretty girl" remark as complimentary and not sexual, and that when told it was inappropriate he apologized. Michelle Ervin-Miller was the Safety Advocate in Steel Producing, and Cilenti wanted her number in case he had a safety issue. Ervin-Miller never told Cilenti that his conduct toward her was offensive.

Grievant Cilenti testified that the note he gave to Rich Nagg for Michelle Ervin-Miller contained stock and investment recommendations for an IRA. Nagg did not transmit the note to Ervin-Miller but discarded it without reading it.

Cilenti stated that he had not know the term "Chink" was offensive. He did not direct the term at any individual and did not intend it as a racial remark. He considered tools made in China to be of poor quality, and acknowledged that he said that "the Chinks" make poor quality. He faults China for millions of lost jobs, low wages, poor quality and Communism.

He testified that Juan Valdez was Henry Cuevas' nickname, but that he never called Cuevas that to his face, only Henry or hey you. Cuevas never told him the nickname was offensive. When asked if he meant the term to be derogatory, he paused and then responded, no.

Cilenti stated that he did not direct his comments to the employee who submitted the complaint (quoted above) but was speaking to other people. He stated that he was speaking in general and not to her. He conceded that she did ask him to stop, once or twice.

Issue as Framed by the Arbitrator

The issue is whether the Grievant violated the terms of his last chance agreement.

Position of the Employer

The Company asserts that it gave Grievant Cilenti several opportunities to correct aberrant behavior because of his long tenure but he failed to do so. However, it also maintains that his long tenure does not avail him because he was subject to a last chance agreement. It submits that under the terms of the last chance agreement, it does not need to apply progressive discipline but that "one strike and you're out."

It regards the last chance agreement as a binding contract under which termination is the only possible penalty for a violation, and it contends that the last chance agreement "supersedes the collective bargaining agreement, including the just cause provisions."

The Employer considers its only burden in this case is to show by a preponderance of the evidence that the Grievant violated the last chance agreement. It notes that all the incidents leading to the last chance agreement and the termination occurred within about two months.

It avers that Grievant Cilenti used racially charged language on several occasions and refused to stop even after being asked by a co-worker. It emphasizes its zero tolerance policy for harassing, racially charged and derogatory language. It urges that the use of such language constituted "objective evidence of any irrational behavior." It stresses that the last chance agreement dispenses with the requirement to follow justice and dignity.

It considers the claims that the Grievant's usage was no more than slang or a nickname as disingenuous.

It asks that the grievance be denied.

Position of the Union

The Union emphasizes the Grievant's over 45 years of service at the plant. It regards the claim that Grievant Cilenti violated the last chance agreement as "baseless," and it considers the current allegations as "completely separate" from those involved in the last chance agreement. It deems that "objective evidence" means without bias and subject to thorough review. It stresses that the Grievant's language was not directed at an employee or individual, that no one was called a derogatory name, or harassed.

It submits that the Company's entire case is based on a statement from an employee who only overheard the comments, which were not directed at her. It insists that a reference to "Chink tools" was not used to describe a person, and it avers that the Chinese government subsidizes its industries, to the detriment of American industry and American workers. It views Chinese made tools as of poor quality. It observes that the Grievant did not make his comment in front of or toward a person of Chinese descent.

The Union insists that Juan Valdez was not a racial epithet but a nickname, a common practice in the shop. It recalls that this comment was not made directly to the Supervisor and that the Supervisor never claimed to have been offended.

It sees no harm in asking a Safety Advocate for the Advocate's phone number and it stresses that the Advocate herself, like the Supervisor, never complained. It maintains that for conduct to amount to harassment, there must be a harassed person. It points out that neither the Safety Advocate nor the Supervisor told the Grievant not to use such language, and that the complaining co-worker was not a member of any affected class.

It notes the failure to apply justice and dignity. It especially faults the Company for failure to conduct harassment training, so that employees would understand the rules. It points to the requirement in Article Four Section C (1) for annual training in harassment awareness and prevention. It maintains that the purpose of the language was to take the guess work out of the subject, particularly for workers who grew up in a different era, when different language was acceptable, and that "a little education would go a long way." It argues that "The Company is bound to make those guidelines clear through training and education." It summarizes that the Grievant did not know then that such phrases could be offensive, but does now.

It asks that the grievance be sustained and that the Grievant be reinstated and made whole for lost wages and benefits.

Analysis and Conclusions

Last chance agreements have been in use for over four decades (see Porcelain Metals Corp., 73 LA 1133, 1138 (Raymond Roberts, 1979)), and in many different industries.

So far as I am aware, last chance agreements are always called exactly that, last chance agreements. A document not designated as a last chance agreement may not have the same effect as a last chance agreement. See Q.C., Inc, 106 LA 987 (John P. McGury, 1996). A "last chance warning" is not the same as a last chance agreement. International Paper Co., 109 LA 472 (Thomas E. Terrill, 1997). Last chance agreements are almost universally held to be valid and enforceable by arbitrators.

Last chance agreements are typically utilized where the employer accuses an employee of serious misconduct which the employer regards as warranting termination. Rather than risking an uncertain result in arbitration, the parties enter into a last chance agreement under which the employee is reinstated subject to certain conditions. Once the last chance agreement has been signed, whether the employee in fact committed the alleged misconduct, or whether termination was an appropriate sanction for such conduct is no longer material, nor subject to relitigation in a subsequent arbitration for the employee's alleged breach of the last chance agreement.

Some arbitrators analyze a last chance agreement as a modification of the collective bargaining agreement. Ingersoll-Dresser Pump Co., 114 LA 297, 301 (Mei L. Bickner, 1999); Vons, a Safeway Company, 114 LA 659 (Joseph E. Grabuskie, 2000); Merchants Fast Motor Lines, 99 LA 180 (Ernest E. Marlatt, 1992); Butler Mfg. Co., 93 LA 441, 445-447 (Jonathan Dworkin, 1989). My own view is that a last chance agreement does not remove the contractual requirement of just cause for termination, but instead defines what just cause means in the context of the particular employee, so that if the employee violated the terms of the last chance agreement, just cause exists for the employer to terminate him/her. See also Ingersoll-Dresser Pump Co., supra. The philosophical underpinning of a last chance agreement is a matter of more theoretical than practical importance, since under the typical last chance agreement, the only issue is normally whether in fact the employee engaged in conduct prohibited under the last chance agreement, or failed to engage in conduct required under the last chance agreement. So generally there is an all-or-nothing outcome, with no room for a middle ground.

There is no universal or required format for the terms of a last chance agreement, and the parties are free to specify what future conduct will be grounds for termination. I have seen last chance agreements stating that any subsequent conduct that would warrant the imposition of any discipline at all is grounds for termination, or any conduct of certain specified types, or any conduct of the same nature as that which led to the last chance agreement, or any conduct of the same degree of seriousness as that which led to the last chance agreement. Some last chance agreements state that attendance infractions will result in termination. Others require an employee to refrain from certain off-duty conduct such as use of alcohol or drugs, or to attend treatments such as under an employee assistance program, under penalty of discharge.

Whatever the terms of a last chance agreement, the issue in an arbitration case involving a subsequent discharge is normally limited to whether in fact the employee violated the last chance agreement by engaging in conduct prohibited under the last chance agreement or failed to comply with conduct affirmatively required. Circumstances that would normally would be considered under the just cause protocol, including progressive discipline, or how other employees who engaged in similar conduct were dealt with, or mitigating factors such as long service, are simply immaterial in the usual last chance agreement case.

The last chance agreement in the present case, is in one respect a standard one and in another respect an unusual one. It prohibits the Grievant from engaging in what might be called insubordination, but it also prohibits "irrational behavior." Whether a specific act amounted to irrational behavior might be subject to debate in some cases. But the specific allegations in this case of harassment or discrimination would surely constitute irrational behavior, so that this case does not involve interpreting the terms of the last chance agreement but simply determining whether the Grievant violated those terms.

The Company alleges that Grievant Cilenti engaged in three types of harassing behavior: gender, ethnic and racial. As to the first two of these the facts are at least somewhat ambiguous; as to the third, they are not.

Grievant Cilenti's characterization of Michelle Ervin-Miller as a pretty girl and his suggestion of interest but for the age gap are not a basis for upholding his termination as a violation of the last chance agreement. Whether or not the Company could have enforced the last chance agreement at that time, it chose to issue a written warning instead. To now revisit those events as a basis for his discharge would amount to double jeopardy. At most his earlier comments about Ervin-Miller and the written warning that resulted might have suggested to him a need to be particularly careful in his use of language.

The key consideration in these situations is the reaction of the person being "pursued." If he or she tells the coworker that he or she finds the attention unwelcome, and especially if he or she tells the coworker to stop, continued attempts to engage may amount to sexual harassment. If the person being pursued welcomes the attention, the diagnosis is mutual attraction, not sexual harassment.

Grievant Cilenti's request for Ervin-Miller's telephone number is ambiguous. It could be merely to have a contact number to be used only in the event of a safety issue, or as indicating a personal interest.

His attempted passing of a note, through a third party, with his investment recommendations seems peculiar.

From the evidence presented, I simply cannot determine whether Ervin-Miller considered Cilenti's interactions as unwelcome. I recognize that the Company was precluded from calling her as a witness under Article Five Section I (8) (c) of the Basic Labor Agreement. Nonetheless, there is no evidence that she told Cilenti to stop such activity.

In view of the uncertainties involved, I consider it unnecessary to reach specific findings and conclusions as to the Company's contention that Grievant Cilenti engaged in sexual harassment of Ervin-Miller.

His references to Henry Cuevas as "little Juan Valdez" are more problematical.

According to Wikipedia:

> Juan Valdez is a fictional character who has appeared in advertisements for the National Federation of Coffee Growers of Colombia since 1958, representing a Colombian coffee farmer. The advertisements were designed by the Doyle Dane Bernbach ad agency, with the goal of distinguishing 100%-Colombian coffee from coffee blended with beans from other countries. He typically appears with his donkey Conchita,[1] carrying sacks of harvested coffee beans. He has become an icon for Colombia as well as coffee in general, and Juan Valdez's iconic appearance is frequently mimicked or parodied in television and other media.

The Grievant's assertion that Cuevas' nickname is Juan Valdez seems dubious for three reasons. First, there was no corroboration for this claim. Second, according to Cilenti's own testimony, he never called Henry Cuevas "Juan Valdez" to his face, only Henry or hey you. One possible implication of this is that "Juan Valdez" was a nickname for Henry Cuevas only used among other employees behind Cuevas' back, and that he did not accept or perhaps even know of this nickname. If this is the case, "Juan Valdez" could be heard as an ethnic slur, even though the fictional Juan Valdez character does not seem to be one of ridicule. Third, even if the nickname itself is considered innocuous, adding the diminutive "little" to it suggests an intent to use the phrase in a "belittling" manner.

Once again, an important factor in whether the use of this "nickname" amounts to ethnic harassment or discrimination is Cuevas' own reaction to the name. Once again the record simply does not provide this information. In this case, however, the Company was not precluded from calling Cuevas as a witness to state whether he knew what Cilenti and perhaps other employees were calling him, and if so whether he regarded the name as humorous or derogatory.

Once again in view of the factual uncertainty in this regard, I make no findings or conclusions as to whether Cilenti's nickname for Henry Cuevas amounted to ethnic harassment or discrimination.

I reach a different conclusion with respect to his use of the word "Chink."

Dictionary.com includes the following entry for "Chink":

> noun (sometimes lowercase) Slang: Extremely Disparaging and Offensive.
> a contemptuous term used to refer to a Chinese person.

Nearly a quarter of the way through the 21st century, an employee who claims to be unaware that the word is racially offensive is at best guilty of willful ignorance. The word "Chink" is one of a handful of words that should never be spoken in an American workplace. Even if, in 2023, Grievant Cilenti could initially have been unaware of the racially offensive content of the term, he nonetheless continued to use it multiple times, even after being told by a coworker that it was offensive. In this regard I credit the statement of the coworker over Cilenti's version that he used the word only once or twice.

Furthermore, Cilenti's defense that he did not direct the word to a person of Asian heritage or in the presence of a person of Asian descent renders somewhat suspect his claim of ignorance that the term is a racially offensive one. Contrary to the Union's assertion, Cilenti did not use the term only as an adjective, as in "Chink tools," but by his own testimony he spoke of "the Chinks."

One need not be a member of the maligned group in order to be offended or shocked by hearing a disparaging term. Many white Americans would resent the use of words insulting to black Americans, and similarly with respect to words insulting to Asian Americans.

But whether anyone who happened to be in hearing distance was offended by the insulting language is beside the point. The mere use of racially offensive terms tends to create an environment of racial hostility and discrimination. It conveys to fellow employees that such language is permissible and undermines an atmosphere of harmony. U.S. Steel Corp., 2020 BNA LA 1019, page 9 (Terry A. Bethel, 2020).

Considerations such as whether the offensive statement was made directly to or about an individual in the targeted class, or whether any member of the class was present when the statement was made, implicate the severity of the misconduct and not whether the use of a racially derogatory term amounts to misconduct. If this case involved a typical application of just cause, such factors might be pertinent to the appropriate degree of discipline. But in a case involving a last chance agreement, once a determination is reached that the Grievant engaged in misconduct and that such misconduct violated the terms of the last chance agreement, the result is settled.

I conclude that Cilenti's repeated use of the epithet "Chink" and his insistence on continuing to do so after being told to discontinue using such language amounted to misconduct and more specifically misconduct of the sort encompassed by the term "irrational behavior in the workplace" as used in the last chance agreement.

Inasmuch as the Grievant was bound by the last chance agreement and he violated the terms of the last chance agreement, the Company had the right, under the terms of that agreement, to "immediately suspend Grievant with intent to discharge." I therefore conclude that the grievance should be denied.

The Union criticizes the Company for failing to carry out its commitment to provide annual harassment awareness education under Article Four Section C (1). This is not a grievance alleging violation of the cited provision, and I have no authority in this case to issue any remedy in this respect. Rather, in this case the Union points to the Company's alleged failure to comply with Article Four Section C (1) as a defense. In some marginal cases an employee might claim excusable ignorance, but this is not such a case. By now, use of the term "Chink" cannot be excused. Moreover, Cilenti's continued use of the term after being cautioned indicates that harassment awareness education likely would have been unavailing in his case.

The termination of an employee with over four decades of service is highly unusual and necessarily prompts an arbitrator to wonder whether any other result is possible. But under a last chance agreement, factors such as mitigation and long service are simply immaterial, and once it has been determined that the Grievant violated the terms of the agreement providing for suspension with intent to terminate upon such violation, no other result is possible.

Award

The grievance is denied.

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Matthew M Franckiewicz