
In the Matter of the Arbitration	:	
	:	
Between:	:	Opinion and Award
	:	
SAG-AFTRA	:	Grievance: Jad Sleiman discharge
	:	
and	:	
	:	
WHYY	:	
	:	

Before: Lawrence S. Coburn
Arbitrator

Appearances:

For the Union:

Rebecca Hayes, Esquire

For the Employer:

Duane Morris LLP
By: Thomas G. Servodidio, Esquire
Elizabeth C. Mincer, Esquire

* * * *

I. Introduction.

Pursuant to the Collective Bargaining Agreement between the parties, I was designated to arbitrate the grievance in this case which involves a claim by SAG-AFTRA (the “Union”) that WHYY (the “Employer” or “WHYY”) violated the Collective Bargaining Agreement by discharging Jad Sleiman (“Grievant”) for his off-duty conduct as a stand up comic. On August 24, October 3 and October 19, 2023 I conducted hearings at which both parties were afforded full opportunity to present evidence and argument in support of their respective positions. The parties submitted briefs on December 1, 2023, at which time the hearing was declared closed.

II. The Issues.

The issues for determination, as stipulated by the parties, are as follows:

1. Did the Employer have just cause to discharge Grievant, Jad Sleiman?
2. If not, what shall be the remedy?

III. Pertinent Contractual Provisions.

The Collective Bargaining Agreement between the parties provides in pertinent part:

PREAMBLE

The parties agree that it is of paramount importance that WHY Y continues to provide excellent service to the community it serves and that to achieve this ongoing goal it is essential that all employees and managers, extend their best efforts at all times, and that the parties agree to a mutual goal of having a workplace that is fair and beneficial to and for all employees.

Article 2, Section 4(e) (Management Rights)

Except as modified or restricted by a specific provision of this Agreement, in order to operate its business, WHY Y retains the exclusive right to manage the business, to direct and control the workforce, and to make any and all decisions affecting the business, whether or not specifically mentioned herein and whether or not heretofore exercised, including but not limited to the following: the right to hire, promote, demote, lay off and assign, transfer employees from one job classification to another, suspend, discharge and discipline employees for just cause, and schedule employees, as well as determine hours of work and schedules, if any, determine the number of employees necessary to perform specific duties, if any; determine or alter the nature of the business; discontinue assignments, podcasts, blogs, or other projects, programs, and series, in whole or in part, at any time; determine the methods, procedures, materials and operations to be utilized or to discontinue the utilization; increase or decrease the number of work shifts, start and end times; promulgate and enforce rules and regulations; change, combine or abolish job classifications; determine job content and qualifications; set standards and methods of job performance and performance evaluation; discontinue, reorganize or combine any department or area of WHY Y with any consequent increase or reduction or other changes in the workforce; introduce new or improved methods; and in all respects to carry out, in addition, the ordinary and customary functions of management, except as specifically abridged, altered or modified by the terms of this Agreement.

Article 2, Section 6(b)(i) (Grievance and Arbitration)

The jurisdiction and authority of the arbitrator and his/her opinion and award shall be confined exclusively to the interpretation and/or application of the express provisions of this Agreement. The arbitrator shall have no authority to add to, subtract from, or modify in any way the terms of this Agreement or, in the case of contracts in excess of the minimum standards, the contract.

Article 3, Section 3 (Non-Discrimination)

WHYY is an equal opportunity employer. WHYY and SAG-AFTRA shall not discriminate on the basis of age, race, color, religion, gender identity, national origin, physical or mental disability, sexual orientation, genetic information, military service, or because of marital, parental, veteran status, or any other characteristic protected by federal, state, or local law.

Article 3, Section 6(a)(b)(c) (Discipline & Discharge)

(a) Except as provided in Paragraph (b) below, the Employer may discharge, suspend or otherwise discipline any employee only for just cause. It is understood that, while discipline will usually be progressive and corrective, there may be circumstances where the offense or conduct of the employee may be so egregious that it warrants immediate discharge without prior warning or notice.

(b) Except as provided in Section (a) above, employees will be provided progressive discipline before discharge in accordance with WHYY's corrective discipline policy as it may, from time to time, be modified. A copy of the policy will be provided to unit employees and the Union.

(c) If the Employer wishes to have an investigative meeting with an employee which the Employer reasonably anticipates may lead to the discipline or discharge of the employee, the Employer will advise the employee of his/her right to have a steward present and will not deny the employee's request for Union representation at the meeting. The Employer will not be required to unreasonably delay the meeting in order to provide a specific Union representative. If there is good reason to proceed, the employee may select another representative who is available.

Article 4, Section 3(a)(b) Diversity, Equity & Inclusion

(a) Commitment. WHYY, SAG-AFTRA, and the employees covered by this Agreement share a mutual commitment to the principles of social justice,

diversity, equity and inclusion. The parties hereto reaffirm their commitment: (i) to a policy of non-discrimination as set forth in the Non-Discrimination article of this Agreement, and (ii) to continue the active promotion of social justice, diversity, equity and inclusion.

(b) Social Responsibility Program. In furtherance of the mutual commitments expressed in this Article, the WHY Y Social Responsibility Program (“Program”) shall be responsible for, among other things, addressing and promoting the goal of a diverse and equitable workforce, developing opportunities for mentorship and advancement, commitments to promoting equity through community interaction, programming and coverage of the stories and to discuss ideas and opportunities to further the parties’ mutual commitment to the principles of social justice, diversity, equity and inclusion.

The Program shall include SAG-AFTRA-covered employees as well as WHY Y managers and other employees, who shall meet on a semi-annual basis or as necessary. Workgroups may be created for specific issues, and these Workgroups may meet on a more regular basis.

Article 4, Section 12(a)-(f) (Social Media)

(a) When using digital and/or social media platforms, employees are expected to use the same journalistic standards of fairness, balance and legal and ethical propriety as they would to an audio or video production.

(b) Employees, when using digital and/or social media platforms for their personal use, including when expressing an opinion on political and/or social behalf of WHY Y, regardless of privacy settings. The parties recognize, however, that, even with the disclaimer, an employee’s statements or images on personal social media may be harmful to the interests of WHY Y. The nature of an employee’s position with WHY Y will determine the character and content of what an employee can or should put on their personal social media accounts, even those unrelated to their work. **Generally, employees must take care that their postings cannot be interpreted as inflammatory, unethical or illegal**, since such posts may have an adverse effect on WHY Y. [*Emphasis added*].

(c) Employees using professional or personal digital and/or social media platforms will not divulge confidential WHY Y information.

(d) An employee will remove a post if required by WHY Y, if WHY Y reasonably believes that the post could create legal or reputational risks for WHY Y.

(e) Employees will be guided by WHY Y's policy on social media. A copy of the social media policy will be provided to the Union. WHY Y will give the Union no less than thirty (30) days' notice of any changes to the policy with the opportunity to bargain over the effects of those changes. The Discipline and Discharge and Grievance and Arbitration Provisions of this Agreement shall apply in the case of any employee who is subject to discipline or discharge in connection with this provision or the social media policy.

(f) WHY Y will not apply this provision or its social media policy in such a way as to violate the Section 7 rights of employees.

IV. Pertinent Provisions of WHY Y's Employee Handbook.

WHY Y's Employee Handbook was distributed to bargaining unit employees in July 2022. It reiterated the Social Media Policy in substantially the same form as the Social Media provisions in the Collective Bargaining Agreement. Likewise, it repeated much of the language in the Collective Bargaining Agreement relating to discipline and discharge of employees, including:

WHY Y may only discharge, suspend, or otherwise discipline an employee for just cause. It is understood, however, that while discipline will be progressive and corrective, there may be circumstances where the offense or conduct of the employee may be so egregious that it warrants immediate discharge without prior warning or notice. Before a final decision is made, and to ensure fairness and consistency, the employee's manager, the division vice president, Human Resources and Legal will review and approve the decision before it is implemented.

The last sentence of the above-quoted paragraph did not appear in the Collective Bargaining Agreement and was added by management unilaterally, ostensibly to ensure that a summary discharge of an employee would be fairly and consistently considered.

The Employee Handbook also included a Code of Conduct, which provided in pertinent part:

Workplace Conduct

Code of Conduct

When working at WHY Y, you are expected to maintain certain standards that help to maintain WHY Y's reputation in the community. These standards relate to workplace conduct, job performance and business practices that impact the organization both internally and externally. Such standards include, but are not limited to:

- Undertaking your responsibilities with special regard for others, recognizing that actions which bring discredit upon WHY Y or reflect unfavorably upon WHY Y’s ability to serve the community could have a damaging influence upon the support provided by the community for our operations.

* * * *

- Following all established WHY Y policies, rules, and procedures . . . ;
- Avoiding engagement in any conduct which is, or could be perceived as, a conflict of interest; and
- Ensuring that conduct, personal appearance, and oral communication are consistent with high standards of professionalism and propriety.

WHY Y considers these general standards as among those by which job performance and workplace conduct are judged. Your failure to meet these standards may result in corrective counseling, up to and including discharge . . .

V. Background.

The Union represents employees who create content for WHY Y, including reporters for The Pulse, a health and science program broadcast on the radio and distributed in a podcast. Grievant was hired as a reporter for The Pulse in October 2018. According to Grievant, Maiken Scott, creator and Executive Producer of The Pulse, reached out to him while he was living and working in New York City.

A. WHY Y.

WHY Y is a public radio and television station in the Philadelphia area, which depends to a large extent on financial support from its audience. For that reason and others, WHY Y makes every reasonable effort to maintain its excellent reputation for balanced reporting, integrity and serving as a trusted source of information and news.

B. Grievant’s background.

Born of Lebanese parents, Grievant grew up with his parents and brother in West Virginia, where he testified that he was the object of periodic discrimination on the basis of his heritage, especially after 9/11. After high school, Grievant enrolled in the U.S. Marine Corps, where he served as a combat correspondent, serving in Africa and Europe. After his honorable discharge as a corporal, Grievant attended Temple University, studying journalism, funded by the GI Bill. While at Temple, he interned for two years at The Daily News, graduating in 2014 with

a degree in journalism.

Grievant then went to Syria, embedding with opposition fighters, and produced a video about the civil war there. Using the video, he applied for and obtained a job with Stars and Stripes, the U.S. Military's independent news source, as a war zone reporter. In that position, he covered Afghanistan, reporting on the war there. Later, he covered the war in Iraq after ISIS had taken over a large portion of the country. Grievant also had an assignment in Ukraine to cover the fighting there.

Grievant left Stars and Stripes to obtain a Master's degree in journalism at The City University of New York. Thereafter he worked as a reporter for Agence France Presse in its Middle East Bureau in Cyprus to cover ISIS in Mosul, Iraq. When ISIS lost the battle there, Grievant returned to New York City, where he freelanced a while for the Associated Press. While in New York, he explored starting a podcast with several podcast houses. One of them recommended Grievant to Maiken Scott, who reached out to Grievant and hired him as a reporter for The Pulse.

C. Grievant's job as a reporter for The Pulse.

The job description for "Multi-Media Reporter - The Pulse" describes the scope of the position as follows:

This position is responsible for reporting stories, both on-air and online, for The Pulse's health and science beat, and assisting with important production tasks for the show.

The job description lists major duties and responsibilities of the job, which include:

- File health and science stories for the one-hour radio show and podcast,
- Help to book, prep and cut interviews as needed, build out show segments, edit show audio, think through show rundowns and offer feedback on scripts in progress.
- File corresponding web text and photos (if applicable) for each audio story.
- Use social media to promote work and seek out ways to help build the brand of the show.

In his job, Grievant used his name, Jad Sleiman, as his byline. According to Grievant, management encouraged him to develop stories with diverse voices from the community who are seldom heard on the air. His normal hours were 9:00 a.m. to 5:00 p.m., or 10:00 a.m. to 6:00 p.m.

Grievant testified credibly, and without contradiction, that he had no significant name recognition as a result of his work as a reporter for The Pulse, which was a growing show, but not in the same league as a nationally known show like Fresh Air.

D. Grievant’s moonlighting as a standup comic.

After Grievant was diagnosed with multiple sclerosis in 2021, he began performing as a stand-up comic. According to Grievant, multiple sclerosis (MS”) is a neurological disease which causes one’s immune system to sporadically attack one’s brain and spinal cord, which can interfere with one’s ability to walk and otherwise function. He testified that he never knew when an attack would hit him, when an attack would subside, what part of the body would be attacked, or if the disability would become permanent.

During the height of Covid-19, Grievant obtained permission to work primarily from home for medical reasons, supported by a medical certification. Grievant found that stand-up comedy was a good outlet for him, because, if he had an MS attack, he could sit down, and leave the microphone on the mic stand so that he need not hold it. He used “Jad S” as his stand-up name. He performed at small venues including a black venue called Comedy John in North Philadelphia, some queer/trans bars in Old City, and a Puerto Rican bar in northern New Jersey. Occasionally, he performed at a comedy club. His performances were at night, normally after 8 p.m. Grievant testified credibly that, when performing comedy, he did not mention that he worked for WHYY, and that nobody told him that they recognized him as a WHYY reporter.

Grievant testified that he came up with the content for his stand-up routines from his experiences as an Arab American, raised in a Muslim family, his experience in the U.S. Marine Corps, and his reporting while he was in the Middle East. He attempted to word his presentations carefully, striking a balance between “going overboard and upsetting people” and saying “things in the most interesting and funny way” since the aim was for the audience to have fun.

Grievant routinely posted videos of his comedy routines on his personal social media accounts, primarily Instagram and YouTube. His username on Instagram was “jadsly,” and his username on YouTube was “Jad S. Comedy.” Grievant did not refer to WHYY in his Instagram or YouTube bio. He testified that he only posted video clips of his stand-up routines that resulted in laughter from the audience – which was not always the case. According to Grievant, if a routine was not successful, he would modify it to make it more amusing.

WHYY introduced into evidence nine videos of Grievant’s stand-up routines, all of which were posted on social media, the transcripts of which are set forth below:

1. Even Woke People Kind of Hate Us

Believe me, even woke people kind of hate Muslims don’t they? Yup. “Refugees

are welcome...to start treating their women a little better.” Wait, it is true that like women are treated a little better in the west for a while. After like 35, 40 it gets pretty brutal, doesn't it? There's no retirement age for looking hot in the west. That's why you see American grandmas wearing makeup and shit. American women have to be as fuckable as possible until they're dead, which I don't think is fair. Y'all I want to start a rescue charity that helps women of a certain age move to Saudi Arabia. They're gonna be like, “What, I don't gotta to do botox or dye my hair?” I'm like, “Lady, you don't even gotta drive. In fact, yeah, they prefer you didn't.”

2. Pussy Transplant

Do y'all remember how at the start of my set I was like, “The hell, was she born without a pussy?” As I was writing that, I Googled: “Can you be born without a pussy?” And, obviously, yes. Women can also be born without pussies it turns out. The treatment for it is like reconstructive surgery or the donor method. The donor method has been performed once. It was a success and the donor was the girl's mom. Science should be illegal dude, the fucking hell. Ok that means there's someone out there walking around with their mom's pussy. Alright second off, y'all this means, y'all know this means pussy can be passed down the generations. Yo that pussy is a family heirloom. In fact, that pussy is the most family heirloom and then it creates more family. Dude it works alright. That girl got fucked in the pussy. Let me start that again, that girl got fucked in her mom's pussy and had a kid, dude.

3. USMC Boot Camp

Anytime we stood in line in boot camp, your toes had to touch the heels of the boy in front of you. They call this standing nut to butt. If the nuts are touching the butts, where's the dicks go? Come on, I feel like they didn't think this one through, dude. Like when I was in the Marines, they still didn't like let gay people in. It was called “Don't ask, don't tell.” I feel like nut to butt is an excellent way to tell, dude. You learn some shit about yourself standing nut to butt dog. I'm straight as hell, dude, but I was getting half a pump off these boy butts. It's like, what if you was gay right and you had to hide it, what would you do? What do gay dudes think about when they don't want to get boners? And I was like oh obviously vaginas, dude. Vaginas are so gross straight dudes can think of vaginas to not get a boner, dude. I was eating this pussy, Saturday, and homegirl reached down and opened up and I was like, Yo, chill. What the hell, you gotta get my consent before some freak shit like that.

4. Went to Chinese Whore House

I was in Iraq, cause I was filming these European volunteers that had gone there to fight ISIS. My first night in Iraq, they treated me to a night at a Chinese whorehouse, which I mean, how thoughtful. I saw such horrific things in there that I walked out and was like maybe ISIS has a point. You stray too far from Allah, dude, you end up getting a lap dance from a fifty year old Chinese woman. I didn't ask for this lap dance, this is a whorehouse, it's a place that sells fucking and like they had mozzarella sticks and shit, but mostly fucking. So they like a lap dance, that's like waters for the table, you know, everyone, just bring 'em out. The vibe in a Chinese whore house in Iraq is exactly like the vibe in like a strip club, which is if it's your first time your boys want to get you a dance. I already had a dance, so what my boys wanted to get me was a Chinese whore. And I'm not, I'm not calling her a sex worker for a reason, dude, because it's not like she was a bored NYU slut. This is a sex trafficked person. I was like I don't care if you paid for it, I'm not banging out a slave. I'm not half of the founding fathers.

5. Asian Manpower

Grievant: Who wants to hear my phone call with the leading provider of Asian manpower?

Playing recording on phone:

Staffing Agency: Hello
Grievant: What are you guys?
Staffing Agency: Oh we are staffing agency.
Grievant: So, if I wanted five Chinese guys, if I had an emergency right?

Staffing Agency: Yeah that would be possible.
Grievant: Now is there a cost difference? I'm not going to say which one of these guys I expect to be more expensive.

Staffing Agency: The Japanese.
Grievant: And which one to be cheaper?
Staffing Agency: Philippines.
Grievant: But a Korean gentleman verses a Laotian gentleman. Which one am I getting a better deal on? Which one is more affordable?

Staffing Agency: Oh they all, they all the same price.
Grievant: Now did you ever as a joke sneak in a black dude? Like, like someone says "Listen I need I need 11 Chinese guys but one of them is just obviously a black guy."

Staffing Agency: Oh, no.
Grievant: Who wants to hear my phone call with the leading provider of Asian manpower?

6. Kind of Racist

I've decided I prefer, uh, "raghead terrorist" to "person of color." Please respect my identity. I work at one of these places that's so woke it's kinda racist. Like this lady asked my boss, she's like "Yo, does Jad consider himself a person of color?" Uh, because she was making a list of us. Fucking hell? Sick alright. I get to be on in this lady's brown dude pokedex, hell yeah. Here's the thing. It's weird being an Arab right now. America is so focused on race right now, but we don't fall in the big ones. Like we're not black and we're not really white. You know what I'm saying. Like, I'll put it this way, after 9/11 we definitely weren't white and now that it sucks to be white, we're kinda slipping back into it, the hell, dude. Does Jad consider himself a person of color? I'm like, "I get a choice now, dude?" After 9/11 I didn't get to pick. Remember? You said you'd never forget what my people had done.

7. Trump vs Muslims vs Jews

People say Trump hates Muslims. So do my parents. If you're not the same exact dumbass type of Muslim as they are, you might as well be Jewish. Which people say, people say, uh Muslims hate Jews. It's more accurate to say, we're very afraid of them. They've been kicking our ass for, like, 70 years. We gotta rethink that term homophobia, dude. Homophobia means you hate gay people. It doesn't mean homosexuals have defeated you in a dozen wars. The Jews finally stood up after centuries of persecution in Europe and somehow we got the ass whooping. What the hell, Jews, we weren't there dude. We cut our dicks off, same as y'all. I thought we was boys.

End of standup.

This is a message to you, Mr. Obama, buy tickets for High Minded January 20th at Bar XIII in Wilmington, Delaware.

8. We Had Slaves

I lived in a lot of *inaudible*

It's like in the Arab world, we had slaves but a lot of them were white. You can't talk about having white slaves without it sounding like a brag. Oh, these guys, yeah they're from Europe, very expensive. Uh, yeah, we had one of them speaks

French. “My name is Jean Pierre,” your name is Abdul. Shh.

End of standup.

Y’all, the fucking media is spreading hateful rumors about me, talking about squid destroyed my penis with their fucking beaks. False, those bigot cowards only managed to damage it severely. I gotta go back up to New York to set the record straight at the Nest in Brooklyn, Thursday September 22nd. \$10 cover charge. We got killers on there and, fucking, there’s no Tom but Tom. Death to the New Jersey Civil Air Patrol.

9. Diesel Mohammed

You know black Muslims weren’t getting jumped after 9/11. I love thinking about that. Imagine, like a couple of racist dudes they’re like “Yo, we’re going to fuck up the next Muslim we see.” And who rounds the corner but fucking Diesel Mohammad? Just a jacked black dude in a kufi. They probably look at each other, “Listen, not all Muslims are terrorists, let’s get like an Indian kid or something.”

End of stand up

Yo, I’ve just received word from Diesel Mohammad. He says you gotta buy tickets to High Minded, January 20th at Bar XIII in Wilmington, Delaware. It’s hosted by that ghoul Fenris and Otis Timlin, he’s half black and half Arab, it’s the second and third worst races there is. It’s going to be comics taking edibles and doing standup comedy but they didn’t specify which edible. I’m going to be eating pussy.

VI. The Facts Surrounding the Filing of the Grievance.

On October 19, Larry Knicely, Manager of Safety and Risk Management, texted to Brad Laszewski, then Director of Facilities, Corporate Services and Security, a screen shot of Grievant’s post on Instagram promoting an upcoming stand-up comedy event:

Come catch me LIVE tonight at Prototype Comedy in Paterson NJ . . . We’re raffling off a bunch of weed.

Grievant’s username of “jadslay” is at the bottom of the screen shot. Later that day, Knicely went into Laszewski’s office and told him that he had run across the post on his Instagram account because he follows Maiken Scott on Instagram, who apparently had posted Grievant’s promotion on her account. Knicely then told Laszewski that he felt Grievant’s stand-up performances were inconsistent with his doctor’s recommendation that he work from home,

Knically also mentioned that there could be some “foul” content in the stand-up performances.

Laszewski thought about his conversation with Knically for a few weeks, and then in November reported it to Ruth Clauser, Vice President of Administrative Services, his boss. He informed Clauser that he had become aware that Grievant was doing stand-up comedy, which seemed inconsistent with his doctor’s note. According to Clauser, she told Laszewski that it was a medical issue and it was being handled as with any other exemption. At that point, Clauser did not investigate the content of Grievant’s stand-up routines. She merely directed a subordinate in the HR Department, Amber Bowen, to ensure that Maiken Scott, Grievant’s immediate supervisor, was aware of the status of Grievant’s medical exemption.

Meanwhile, Scott and Grievant followed each other on Instagram. Scott testified credibly that, as she was going to sleep at night, she periodically scrolled through her Instagram account with the sound off, and briefly viewed the content of some of Grievant’s “stories,” video clips of some of his stand-up routines, at the top of her smartphone screen, which automatically were erased after 24-48 hours. Without scrutinizing the “stories,” she periodically clicked that she “liked” them. Her impression of the routines was that they contained foul language and sexual content, and were not to her taste, but did not cause “alarm bells” to go off.

In November, Laszewski also informed Bill Marrazzo, CEO, of his concern that Grievant was performing stand-up comedy routines while he had a doctor’s note requiring him to work mostly from home to manage stress. Laszewski, who had not at that point viewed any of Grievant’s video posts, also told Marrazzo of a concern that Grievant’s comedy routine might adversely affect WHYY’s reputation, without detailing why.

On or about November 17, Scott and Grievant discussed his FY2022 performance evaluation. Overall, his evaluation was “Fully Successful.” Scott’s comments included:

- | | |
|-----------------|--|
| Creativity - | Jad is a very strong writer and reporter who is always looking for interesting angles in every story he covers. He’s always looking for an element of surprise and discovery, which takes listeners along on his journey. In the next year, I hope Jad pushes himself outside of his comfort zone by experimenting with some new formats in story telling. |
| Edit Faster | Jad submits his stories quickly and is able to go from tracking to produced elements in a short amount of time. In the next year, I would like for Jad to pay closer attention to cleaning up his tape by removing ums and ahs and stumbles from people he interviewed. This is something that I have been doing in post production, but would prefer for each reporter to do. |
| Longer Podcasts | Jad was very helpful in editing several longer form projects this past year. He was part of the team that did listening edits for Serum, which was a very successful podcast. |

Diversity

Jad reaches out to diverse communities and finds story ideas that are pertinent to them. He goes into his reporting with an open mind and allows the reporting to guide him into the stories.

During her discussion of the performance review with Grievant, Scott suggested that Grievant focus on his reporting rather than his stand-up comedy routines:

I believe that he [Grievant] was a uniquely talented reporter. And that there are only so many things we can do with our whole heart and I would advise him to choose journalism over stand-up comedy, because I felt like it was splitting his attention. And that you can only be so passionate about so many things. And I said, "If you have to pick one, please pick journalism."

In mid-November, Amber Bowen asked Scott why Grievant was able to perform stand-up comedy at the same time as he had a doctor's note that said he should work mostly from home. Scott replied that the work-at-home order was related to stress that he experienced at the office, and that he did not experience the same stress performing stand-up comedy. Around the same time, Bill Marrazzo, CEO, approached Scott and asked her why Grievant was performing stand-up comedy and what she thought of the content, for which he had some concern. In reply, Scott, according to Marrazzo, said the content was merely comedic, and Marrazzo told her to forget that he had mentioned it.

On November 19, after her conversations with Bowen and Marrazzo, Scott emailed Grievant on his personal email account regarding "whyy stuff," letting Grievant know that somebody within WHY Y was "agitating" over Grievant's stand-up comedy routines:

Hey Jad,
I just want to give you a heads up that somebody within WHY Y is agitating about your stand-up comedy stuff.
I have gotten questions from HR - in terms of "How come Jad can do stand up but he can't work in the office?"
And somebody even reached out to Bill [Marrazzo, CEO] because they felt that your stand-up routines could potentially be damaging to the reputation of the organization.

I have no idea who that person is - or why they are doing this. So far, I have been able to deflect any inquiries, and I said that your doctor is most worried about stress. I said that being in the office causes you stress, whereas stand-up comedy does not. Bill did not seem interested in taking any action.

I just wanted to mention it in case something comes up, I didn't want it to catch you by surprise.
Maiken

In January 2023, Bowen learned about the content of some social media posts regarding Grievant's stand-up comedy routines, which she described to Clauser. At that point, Clauser searched online for Grievant's posts on social media about his stand-up routines, and, together with Ruth Glover, Vice President for News and Civic Dialogue, found and reviewed nine video clips of the routines that had been posted online. According to Clauser, she found the clips to be in "in direct violation of appropriate and balanced reputational management," were "egregious" in content, and had "sexual connotations, racial connotations, and misogynistic information."

On January 11, 2023, Clauser saw McGrath walking by her office and asked McGrath to join her and Glover to discuss the content of Grievant's social media posts. After McGrath had reviewed the video clips, she concluded that Grievant had violated several policies, including the Social Media Policy and the Social Responsibility Program, and that the violations were so egregious that summary discharge, rather than progressive discipline, should be imposed. For example, McGrath did not see how Grievant, a reporter on health and science, could report on women's health issues in light of the video clips' demeaning treatment of women and their body parts.

Management then conducted an investigation, which entailed Marrazzo, McGrath, Glover and Clauser reviewing the nine video clips copied from Grievant's social media platforms. The four upper management representatives then determined, without including Grievant's supervisor in the decision-making process, and without first interviewing Grievant, that Grievant's social media posts warranted summary dismissal as egregious violations of the Social Media Policy, the Social Responsibility Program and the Code of Conduct.

On January 17, 2023, in Clauser's office with Clauser, McGrath and Glover, Scott was informed that a decision had been made to terminate Grievant's employment. Scott advocated for Grievant, trying to persuade upper management to consider progressive discipline rather than termination. Upper management's response was that the content of Grievant's social media video clips was too egregious to consider progressive discipline. Scott expressed her disagreement with the decision.

A few days later, Clauser and Glover met with Scott to go over the logistics of the termination process, with which Scott was unfamiliar. Scott was asked to sign and read a termination letter to Grievant at the upcoming termination meeting. In addition, Scott was informed of certain of the video clips that had been found to be egregious policy violations,

On January 23, 2023, Scott had a virtual meeting with Grievant and read to him a letter dated January 23, 2023 that had been drafted for Scott's signature:

Dear Jad:

Please be advised that the decision has been made to terminate your employment effective today, January 23, 2023. Your social media presence has been brought to our attention, investigated, and we have concluded that the content is an egregious violation

of the WHY Y code of conduct, WHY Y social media guidelines, as well as it is in direct conflict with the WHY Y values of social responsibility . . .

Sincerely,
Maiken Scott

Following Grievant’s discharge, Stephen Leshinsky, Executive Director of the Union, emailed Ruth Clauser on January 24, 2023 requesting certain information, including the names of the policies that Grievant allegedly violated and the total number of complaints about Grievant received from other employees and members of the public. Clauser promptly replied to Leshinsky in an email dated January 27, 2023, listing the policies violated and stating that complaints by employees and members of the public were not relevant to the termination decision.

Leshinsky responded to Clauser in an email dated January 31, 2023, complaining that progressive discipline was not followed and that the policies cited were applied too broadly. In addition, he notified Clauser that the Union was filing a grievance, requesting a meeting with management within ten days.

The parties met on February 8, 2023 to discuss the grievance. At the meeting, the Union requested that management explain why Grievant’s social media postings were considered to be in violation of WHY Y’s policies. In an email dated February 15, 2023, Clauser set forth a detailed explanation of why management considered the content of the postings was considered to be “egregious and wholly inconsistent with the values of WHY Y and therefore warranted immediate termination.” Because the parties were unable to amicably resolve the matter, it was referred to arbitration for a final and binding resolution.

VII. Discussion.

The issue before me is whether WHY Y had just cause to discharge Grievant. Arbitrators have developed criteria over the years to determine whether an employer had just cause to discharge an employee. Those criteria include whether prescribed procedural protections have been satisfied and whether the employer met its burden of proof that the employee violated the rule or rules as alleged. I will examine below the procedural and substantive issues raised by the parties.

A. Procedural Issues.

The Union has raised certain procedural issues, as to which it bears the burden of proof,

including whether: (1) Grievant had notice of the policies he was alleged to have violated; (2) WHY Y conducted a proper investigation; and (3) WHY Y complied with its own procedure for discharging an employee. I will address each in turn.

1. Notice.

Grievant claims he was unaware of the policies he was alleged to have breached. However, as a member of the bargaining unit, he was charged with knowledge of the Collective Bargaining Agreement which included the key aspects of the Social Media Policy and Social Responsibility Program agreed to by the parties. Furthermore, WHY Y presented credible evidence that, in June 2022, it distributed to all employees the Employee Handbook, which contained the policies and the Code of Conduct which he was alleged to have violated. Accordingly, I find that Grievant had adequate notice of the Social Media Policy, the Social Responsibility Program and the Code of Conduct.

2. Investigation.

The Union claims that management did not conduct a proper investigation because no member of management interviewed Grievant to find out his side of the story regarding the alleged violations of the Code of Conduct and of the various policies he was alleged to have violated. No doubt, management believed that, because the facts were clear and could not be disputed – the video clips that were found on his social media accounts showed him performing stand-up comedy routines – Grievant could have no defense so it would have been pointless to interview him. The problem with that approach is that it presumes far too much. Before management finalized its decision, it was obligated under fundamental concepts of due process, to interview Grievant, who might have succeeded in broadening management’s interpretation of the clips.

At the arbitration hearing, Grievant testified about his reasons for saying what he did in each clip. As he did, he argued that management totally missed the point of some of the clips. For example, in the clip entitled “Even Woke People Kind of Hate Us,” where management had attributed to him a misogynistic motive, he actually was advocating, as he unambiguously stated in the clip, that the pressure on older women in the United States to be sexual objects was “unfair.”

Would interviewing Grievant have made a difference in management’s decision? One cannot know. And one cannot turn back the clock. The purpose of interviewing an employee to before a final discharge decision is made is for management to hear the other side of the story before management’s position is set in stone. Once the decision has been made, battle lines are set and justifying the decision becomes paramount.

WHY Y argues that Section 6(c) of the Collective Bargaining Agreement provides that WHY Y was not required to conduct an investigatory meeting in this case, because the provision

begins: “If the Employer wishes to have an investigative meeting with an employee . . .” Thus, WHY Y contends that Section 6(c) stands for the proposition that an investigatory meeting is up to the discretion of WHY Y. I disagree. Section 6(c), when the first sentence is read in its entirety, makes clear that it is intended to afford employees the right to Union representation during an investigation that could lead to discipline or discharge, as required by the United States Supreme Court’s decision in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975):

Section 6(c).

If the Employer wishes to have an investigative meeting with an employee which the Employer reasonably anticipates may lead to the discipline or discharge of the employee, the Employer will advise the employee of his/her right to have a steward present and will not deny the employee’s request for Union representation at the meeting. . .

Thus, the thrust of the provision is to ensure an employee’s right to Union representation in accordance with the “Weingarten Rule” if WHY Y opts to conduct an investigative meeting with an employee who is subject to possible discipline or discharge. The purpose of the provision is hardly to give the Employer the option to disregard due process and not conduct a thorough investigation when an employee has been accused of misconduct that might lead to discipline or discharge. Accordingly, I find WHY Y’s Section 6(c) argument to be unpersuasive, and I conclude that management’s failure to interview Grievant before finalizing the decision to discharge him violated Grievant’s due process rights.

3. WHY Y’s discharge procedure.

WHY Y’s Employee Handbook section on Discipline & Discharge provides in its initial paragraph that the decision to summarily discharge of an employee, without prior warning or notice, must be reviewed and approved by, among others, the employee’s manager:

WHY Y may only discharge, suspend, or otherwise discipline an employee for just cause. It is understood, however, that while discipline will be progressive and corrective, there may be circumstances where the offense or conduct of the employee may be so egregious that it warrants immediate discharge without prior warning or notice. Before a final decision is made, and to ensure fairness and consistency, the employee’s manager, the division vice president, Human Resources and Legal will review and approve the decision before it is implemented.

In making the decision to discharge Grievant, the Division Vice President, Sarah Glover, the Vice President responsible for Human Resources, Ruth Clauser, Vice President of Administrative Services, and Kyra McGrath, Executive Vice President in charge of legal matters, and Bill Marrazzo, CEO reviewed and approved the decision before it was implemented. However, Grievant’s manager, Maiken Scott, Executive Producer of The Pulse, the one who

knew Grievant the best, was not included in the decision to terminate Grievant's employment.

According to the last sentence of the quotation from the Discipline & Discharge policy, the reason for requiring that the division vice president, representatives of Human Resources and Legal, and the employee's manager all "review and approve" a decision to immediately discharge an employee without prior warning or notice was to "to ensure fairness and consistency." For whatever reason, Scott was excluded from the review and approval process. Perhaps upper management anticipated that Scott would express her disagreement with the decision to summarily discharge Grievant, as she did after the termination decision was made. In any event, by excluding Scott from the decision-making process, management disregarded the language that guaranteed that Scott would review and approve the decision.

Anticipating this issue, WHY Y argues that the Discipline & Discharge policy does not require an employee's direct manager independently approve every discipline decision, which would take away a higher level manager's authority to override a lower level manager's view. I agree. But the Discipline & Discipline policy, as I read it, provides for an employee's manager, along with three other management representatives, to review and approve every decision to summarily dismiss an employee without prior warning or notice. Accordingly, I conclude that, because management did not give Scott, Grievant's manager, the opportunity to review and approve the termination decision before it was implemented, WHY Y breached its obligation to do so in violation of the plain dictates of its Discipline & Discharge policy.

B. The Merits.

WHY Y asserts that Grievant violated the Code of Conduct, the Social Responsibility Program at WHY Y and the Social Media Policy. I will address each in turn.

1. Code of Conduct.

The heading above the Code of Conduct, and the introduction thereto, make clear that the Code applies to workplace conduct, rather than off-duty conduct, such as Grievant's social media postings of his off-duty comedy routines.

Workplace Conduct

Code of Conduct

When working at WHY Y, you are expected to maintain certain standards that help to maintain WHY Y's reputation in the community. These standards relate to workplace conduct, job performance and business practices that impact the organization both internally and externally. Such standards include, but are not limited to:

- Undertaking your responsibilities with special regard for others, recognizing that actions which bring discredit upon WHY Y or reflect unfavorably upon WHY Y's ability to serve the community could have a

damaging influence upon the support provided by the community for our operations . . .

The heading “Workplace Conduct” above the Code of Conduct in the Employee Handbook, leaves no doubt that the Code of Conduct is not intended to apply to off-duty conduct. Likewise, the phrase in the first sentence to the Code’s introductory paragraph, “When working at WHY Y,” shows that the Code applies to workplace conduct, not off-duty conduct. In addition, the second sentence in the introductory paragraph underscores that the Code relates to “workplace conduct, job performance and business practices. . .”: “These standards relate to workplace conduct, job performance and business practices that impact the organization . . .” The “Workplace Conduct” heading and introductory paragraph frame and define all that follows.

Even the bulleted paragraph quoted above, relied upon by WHY Y as a provision that Grievant violated by posting video clips on his private social media platforms, makes clear that it applied to workplace conduct. ‘Undertaking your responsibilities . . .’ must refer to “workplace responsibilities,” as the language follows immediately after the introduction to the Code of Conduct. I therefore conclude that the language that follows refers to actions in connection with an employee’s work that bring discredit to WHY Y and undermine its ability to generate support from the public.¹ In short, I find that Grievant’s off-duty conduct, including his social media posts, did not violate the Code of Conduct.

2. Social Responsibility at WHY Y.

Article 4, Sections 3(a) and (b), Diversity, Equity & Inclusion), of the Collective Bargaining Agreement addresses the parties’ obligations with respect to social justice, diversity and inclusion:

(a) Commitment. WHY Y, SAG-AFTRA, and the employees covered by this Agreement share a mutual commitment to the principles of social justice, diversity, equity and inclusion. The parties hereto reaffirm their commitment: (i) to a policy of non-discrimination as set forth in the Non-Discrimination article of this Agreement, and (ii) to continue the active promotion of social justice, diversity, equity and inclusion.

(b) Social Responsibility Program. In furtherance of the mutual commitments expressed in this Article, the WHY Y Social Responsibility Program (“Program”) shall be responsible for, among other things, addressing and promoting the goal of a diverse and equitable workforce, developing opportunities for mentorship and

¹ The Code of Conduct incorporates by reference all of WHY Y’s policies and procedures, apparently including the Social Media Policy, which expressly applies to off-duty use of social media. I address the Social Media Policy separately below.

advancement, commitments to promoting equity through community interaction, programming and coverage of the stories and to discuss ideas and opportunities to further the parties' mutual commitment to the principles of social justice, diversity, equity and inclusion.

The Program shall include SAG-AFTRA-covered employees as well as WHYY managers and other employees, who shall meet on a semi-annual basis or as necessary. Workgroups may be created for specific issues, and these Workgroups may meet on a more regular basis.

I find that the thrust of Article 4, Sections (a) and (b) is the promotion of diversity and fairness in the workplace and in WHYY's programming and news coverage. Section (a) refers to the non-discrimination policy, which bars discrimination on the basis of race, gender, etc. in WHYY employment. Section (a) also refers to "the active promotion of social justice, diversity, equity and inclusion," which I interpret to be confined to the workplace.

Section (b) clarifies the last sentence in Section (a), stating that "in furtherance of the mutual commitments expressed in this Article," the Social Responsibility Program is to encourage a diverse workforce, which is consistent with the non-discrimination policy. A goal also is to encourage an "equitable" workforce, which appears to mean that all employees will have a fair opportunity for advancement, good work assignments, and generally fair treatment. Section (b) further clarifies that Section (a) the Program is to encourage mentorship and advancement, fair exposure to the community, and programming and news coverage. All in all, the focus of the Social Responsible Program is on diversity, equity and fairness in WHYY's workforce and in its programming and news coverage, and does not purport to restrict or govern an employee's off-duty conduct.

WHYY claims that Grievant's social media posts are inconsistent with the goals of the Social Responsibility Program, presumably because an employee might view the posts and be offended. Notably, however, the Social Responsibility Program, unlike the Social Media Policy and the Code of Conduct, does not purport to place employees on notice that they are subject to discipline for engaging in off-duty conduct that might be considered inconsistent with the Social Responsibility Program. Accordingly, I conclude that the Social Responsibility Program does not provide WHYY with a vehicle with which to punish an employee for off-duty conduct.

3. The Social Media Policy.

The first two sentences of The Social Media Policy, which is contained in Article 4, Section 12(b) of the Collective Bargaining Agreement, plainly govern employees' personal, off-duty, use of social media platforms:

(b) Employees, when using digital and/or social media platforms for their personal use, including when expressing an opinion on political and/or social

media platforms, will be clear that they are acting on their own behalf and not on behalf of WHY Y, regardless of privacy settings. The parties recognize, however, that, even with the disclaimer, an employee’s statements or images on personal social media may be harmful to the interests of WHY Y. . .

The next two sentences of Article 4, Section 12(b) delineate the standards for using social media platforms, requiring employees to “take care that their postings cannot be interpreted as inflammatory, unethical or illegal, since such posts may have an adverse effect on WHY Y”:

The nature of an employee’s position with WHY Y will determine the character and content of what an employee can or should put on their personal social media accounts, even those unrelated to their work. Generally, employees must take care that their postings cannot be interpreted as inflammatory, unethical or illegal, since such posts may have an adverse effect on WHY Y.

WHY Y has not taken the position that Grievant’s social media posts could be interpreted as unethical or illegal. Rather, its position has been that his nine video clips shown on social media platforms can be interpreted as inflammatory.

The dictate that “employees must take care that their postings cannot be interpreted as inflammatory” appears to be highly restrictive of what an employee may post. I do not read the language to incorporate a “reasonable person” standard. Rather, the language, “cannot be interpreted as inflammatory”, expressed in the passive voice, includes members of the WHY Y audience who may be impulsive, emotional and quick to judge, and include listeners at the extreme ends of the major political parties, many of whom may not come close to the imaginary “reasonable person.” Thus, as I read the language, employees are put on notice that they must be vigilant not to post anything on social media that could conceivably be interpreted as inflammatory even by highly sensitive and thin-skinned individuals without an appreciation for irony or satire.

Merriam-Webster defines “inflammatory,” outside the medical context, as: (1) tending to excite anger, disorder, or tumult; or (2) tending to inflame or excite the senses. I will now assess whether any or all of the nine video clips can be interpreted as “inflammatory” in either of these senses.

a. Even Woke People Kind of Hate Us

Believe me, even woke people kind of hate Muslims don’t they? Yup. “Refugees are welcome...to start treating their women a little better.” Wait, it is true that like women are treated a little better in the west for a while. After like 35, 40 it gets pretty brutal, doesn’t it? There’s no retirement age for looking hot in the west. That’s why you see American grandmas wearing makeup and shit. American women have to be as fuckable as possible until they’re dead, which I don’t think

is fair. Y'all I want to start a rescue charity that helps women of a certain age move to Saudi Arabia. They're gonna be like, "What, I don't gotta to do botox or dye my hair?" I'm like, "Lady, you don't even gotta drive. In fact, yeah, they prefer you didn't."

The first half is hardly inflammatory, suggesting that Americans encourage Muslim refugees to treat their women better, and that women in the west are generally treated better than in Muslim countries, at least for a while. Grievant then opines that after a woman in the U.S. becomes 35 or 40, it gets "pretty brutal," which is provocative but cannot be interpreted as inflammatory. He then states that older women in America are expected to continue looking "hot," resulting in American grandmothers wearing "makeup and shit." So far, it cannot be interpreted as inflammatory. He then states: "American women have to be as fuckable as possible until they're dead, which I don't think is fair." Although the first clause is debatable and grossly articulated, the second clause plainly states that Grievant believes it to be unfair, so any claim that the clip shows him to be demeaning women in the clip, as charged by management, is patently unfair and untrue. On the other hand, the use of the word "fuckable" when applied to elderly women approaching their grave can be interpreted as mildly inflammatory.

The final few sentences in which he proposes starting a charity to help women move to Saudi Arabia, where they do not have to use botox or dye their hair and they are encouraged not to drive cannot be interpreted as inflammatory and are simply funny.

b. Pussy Transplant

Do y'all remember how at the start of my set I was like, "The hell, was she born without a pussy?" As I was writing that, I Googled: "Can you be born without a pussy?" And, obviously, yes. Women can also be born without pussies it turns out. The treatment for it is like reconstructive surgery or the donor method. The donor method has been performed once. It was a success and the donor was the girl's mom. Science should be illegal dude, the fucking hell. Ok that means there's someone out there walking around with their mom's pussy. Alright second off, y'all this means, y'all know this means pussy can be passed down the generations. Yo that pussy is a family heirloom. In fact, that pussy is the most family heirloom and then it creates more family. Dude it works alright. That girl got fucked in the pussy. Let me start that again, that girl got fucked in her mom's pussy and had a kid, dude.

Merriam-Webster defines "pussy" to include a "vulgar" word for "vulva," the external part of the female genital organs. In the clip, Grievant states that his research showed that a girl could be born without a vulva, and that the treatment could include reconstructive surgery or a transplant. He further found that in the one transplant case he found, a mother had donated her vulva to her daughter, suggesting that it was a family heirloom that could be passed down the generations. By repeating the vulgar word "pussy" nine times, and stating that the daughter got

“fucked” in her mother’s pussy, the routine could be interpreted as inflammatory simply because of the vulgar language used.

c. USMC Boot Camp

Anytime we stood in line in boot camp, your toes had to touch the heels of the boy in front of you. They call this standing nut to butt. If the nuts are touching the butts, where’s the dicks go? Come on, I feel like they didn’t think this one through, dude. Like when I was in the Marines, they still didn’t like let gay people in. It was called “Don’t ask, don’t tell.” I feel like nut to butt is an excellent way to tell, dude. You learn some shit about yourself standing nut to butt dog. I’m straight as hell, dude, but I was getting half a pump off these boy butts. It’s like, what if you was gay right and you had to hide it, what would you do? What do gay dudes think about when they don’t want to get boners? And I was like oh obviously vaginas, dude. Vaginas are so gross straight dudes can think of vaginas to not get a boner, dude. I was eating this pussy, Saturday, and homegirl reached down and opened up and I was like, Yo, chill. What the hell, you gotta get my consent before some freak shit like that.

This clip has two general messages. The first message is about marine recruits lining up in boot camp, “nut to butt,” and how difficult it must have been for a gay man, under the “Don’t Ask, Don’t Tell” regime, to keep from getting an erection. As I read this message, I do not believe that it could be interpreted to be inflammatory for straight or gay people.

The second message is how a gay man could refrain from getting an erection standing “nut to butt:” think about a vagina, which, according to Grievant, is gross for gay and straight men like him to think about and would immediately suppress an erection. I find Grievant’s view to be insulting to some women and therefore could be interpreted as inflammatory. Likewise, I find Grievant’s description of his “eating pussy” and being disgusted by his homegirl “opening up” her vagina could be interpreted to be inflammatory.

d. Went to Chinese Whore House

I was in Iraq, cause I was filming these European volunteers that had gone there to fight ISIS. My first night in Iraq, they treated me to a night at a Chinese whorehouse, which I mean, how thoughtful. I saw such horrific things in there that I walked out and was like maybe ISIS has a point. You stray too far from Allah, dude, you end up getting a lap dance from a fifty year old Chinese woman. I didn’t ask for this lap dance, this is a whorehouse, it’s a place that sells fucking and like they had mozzarella sticks and shit, but mostly fucking. So they like a lap dance, that’s like waters for the table, you know, everyone, just bring em out. The vibe in a Chinese whore house in Iraq is exactly like the vibe in like a strip club, which is if it’s your first time your boys want to get you a dance. I already had a dance, so what my boys wanted to get me was a Chinese whore. And I’m not, I’m not calling her a sex worker for a reason, dude, because it’s not like she was a

bored NYU slut. This is a sex trafficked person. I was like I don't care if you paid for it, I'm not banging out a slave. I'm not half of the founding fathers.

This clip shows the irony that the European volunteer soldiers in Iraq, fighting ISIS in part because of its inhuman treatment of women, took Grievant to a Chinese whorehouse where sex-trafficked women were being rented out as sex partners. Grievant made clear that he walked out after seeing "horrific things" there. At the end of the clip, Grievant says that he is "not banging out a slave" unlike half of the founding fathers of the USA.

Contrary to WHYY management, who found that Grievant called women whores and sluts, I find the commentary to be insightful, principled and serious, but not very funny. More important, I find that the message of the clip, if one is open to receiving it, cannot be interpreted to be inflammatory. On the other hand, mere mention of a whorehouse, whores and a slut, can be interpreted as inflammatory, as can his reference to those of our founding fathers who owned and slept with slaves.

e. Asian Manpower

Grievant: Who wants to hear my phone call with the leading provider of Asian manpower?

Playing recording on phone:

Staffing Agency: Hello.

Grievant: What are you guys?

Staffing Agency: Oh we are staffing agency.

Grievant: So, if I wanted five Chinese guys, if I had an emergency right?

Staffing Agency: Yeah that would be possible.

Grievant: Now is there a cost difference? I'm not going to say which one of these guys I expect to be more expensive.

Staffing Agency: The Japanese.

Grievant: And which one to be cheaper?

Staffing Agency: Philippines.

Grievant: But a Korean gentleman verses a Laotian gentleman. Which one am I getting a better deal on? Which one is more affordable?

Staffing Agency: Oh they all they all the same price.

Grievant: Now did you ever as a joke sneak in a black dude? Like, like someone says "Listen I need I need 11 Chinese guys but one of them is just obviously a black guy."

Staffing Agency: Oh no.
Grievant: Who wants to hear my phone call with the leading provider of Asian manpower?

Adjacent to the clip on the social media platform is a caption that states:

Asian dudes from the neighborhood warn btw don't ever work for these guys like this they look for undocumented and fuck you over.

At the arbitration hearing, Grievant gave context to the above dialogue consistent with the caption: staffing agencies use undocumented aliens from Asia and other parts of the world, and rent them out, often in horrific conditions. According to Grievant, he was trying to ridicule the staff agency by exposing their pricing system and arbitrary valuation of human beings from different countries.

Although Grievant makes clear in his caption and clip that he disdains the approach of the manpower agency, including its classifications of Japanese workers being more valuable than Philippine workers, Vice President McGrath found that Grievant was supportive of the agency's approach:

. . . Mr. Sleiman is taking an entire ethnic group and saying, is this ethnic group worth more than that ethnic group? Is that Laotians, Filipinos, Japanese, and Koreans, and what is the relative value of each group? I mean, this is where, you know, at HYY we have many, many Asian employees. . . And I could imagine an Asian employee being extremely uncomfortable sitting there going - - is somebody putting a value on my head that I'm worth less than the next Asian employee sitting next to me?

I mean it just makes your flesh crawl. And you can imagine how that staff person could feel really uncomfortable. That is not the culture we are promoting at WHYY.

I find that the "correct" understanding of the Asian Manpower clip is consistent with WHYY's values and should not be viewed as inflammatory, except by the management of the Manpower Agency. Indeed, Grievant is engaging in a scathing and biting attack on the practices of the Manpower Agency that exploits undocumented Asians. However, I find that the clip "could be interpreted as inflammatory," the very low standard in the Collective Bargaining Agreement that I am required to apply.

f. Kind of Racist

I've decided I prefer, uh, "raghead terrorist" to "person of color." Please respect my identity. I work at one of these places that's so woke it's kinda racist. Like this lady asked

my boss, she's like "Yo, does Jad consider himself a person of color?" Uh, because she was making a list of us. Fucking hell? Sick alright. I get to be on in this lady's brown dude pokedex, hell yeah. Here's the thing. It's weird being an Arab right now. America is so focused on race right now, but we don't fall in the big ones. Like we're not black and we're not really white. You know what I'm saying. Like, I'll put it this way, after 9/11 we definitely weren't white and now that it sucks to be white, we're kinda slipping back into it, the hell, dude. Does Jad consider himself a person of color? I'm like, "I get a choice now, dude?" After 9/11 I didn't get to pick. Remember? You said you'd never forget what my people had done.

This clip pokes fun at the extent to which many American employers classify people by the color of their skin, with individuals of Arab descent like Grievant now having the option of selecting what skin color they prefer to be identified with. Grievant points out the arbitrary nature of these skin classifications, remembering that immediately after 9/11 Arabs no longer had the option of choosing their color. Grievant passionately opposed the division of individuals into color categories, preferring even to be designated as a "raghead terrorist," a categorization he abhorred, to being labeled a "person of color."

Grievant's testimony about the Kind of Racist clip at the arbitration hearing underscored his views on categorizing individuals by the color of their skin rather than their merit as human beings. In addition, he compared the overt racism he experienced growing up in West Virginia, to the corporatized racial consciousness that attempts to make employees less racist:

And this [clip] is taking aim at corporatized racial consciousness that's really popular. It's kind of like the DEI stuff, diversity equity stuff that kind of took over a lot of corporations and academia and stuff --- where somebody comes in and teaches you how to - - tries to make you less racist in a way. And it's my own squeamishness with it where it's like, this doesn't feel that much better than just people being racist --- because it still makes me feel different than other people. And my personal thing is when I think about myself, I don't think about my race first and foremost. I think that's what racists do. I think about myself as like a person, not like an Arab or something. And I feel like a lot of the corporatized stuff is --- the goals are noble, but it ends up going to like a dehumanizing, creepy place. And I think a lot of people recognize it, and that's why they're laughing --- because maybe they work at a place that's doing kind of the same thing.

And it's like, can we just meet in a middle ground where we respect each other without kind of breaking us down into avatars of our race essentially?

McGrath testified that she found Grievant's use of the term "raghead," which refers to those of Middle Eastern origin who wear a head covering like a keffiyeh or turban, to be inflammatory even though he was using the term to refer to himself. Management also found Grievant's reference in the clip to his unnamed employer as "Kind of Racist" was directly

contrary to the stated policies of WHYY, which was required by law to categorize employees by race, national origin, gender, etc.

I find that the Kind of Racist clip to be a powerful condemnation, in a funny way, of what Grievant calls corporatized racial consciousness that makes him, a person of color, feel uncomfortable because he would prefer to be categorized as a whole person regardless of the color of his skin.

I find it important that Grievant called his employer “Kind of Racist” rather than racist in the traditional and abhorrent sense. I also find it important that Grievant, referring to himself, said in the clip that he would prefer to be classified as a “raghead terrorist” than a person of color, emphasizing with hyperbole his opposition to racial classifications. Nonetheless, under the inflammatory standard contained in the Social Media provision in the Collective Bargaining Agreement, which presumes that some may totally misinterpret the message of the clip and become thoughtlessly inflamed, I conclude that Grievant’s use of the label “raghead terrorist” and calling his employer as “kind of racist” could be interpreted (or misinterpreted) by some as inflammatory.

g. Trump vs Muslims vs Jews

People say Trump hates Muslims. So do my parents. If you’re not the same exact dumbass type of Muslim as they are, you might as well be Jewish. Which people say, people say, uh Muslims hate Jews. It’s more accurate to say, we’re very afraid of them. They’ve been kicking our ass for, like, 70 years. We gotta rethink that term homophobia, dude. Homophobia means you hate gay people. It doesn’t mean homosexuals have defeated you in a dozen wars. The Jews finally stood up after centuries of persecution in Europe and somehow we got the ass whooping. What the hell, Jews, we weren’t there dude. We cut our dicks off, same as y’all. I thought we was boys.

In this clip, Grievant first points out the absurdity of Muslims like his parents hating Muslims because they belong to a different sect. He later comments on how, although people say that Muslims hate Jews, they are actually afraid of them, because in wars between Israel and various Arab countries, Israel always has prevailed. In addition, Grievant acknowledges the persecution of Jews in Europe for centuries, but laments the fact that, instead of striking out at those who persecuted them, the Israelis ended up warring with Muslims. Grievant also observes that Muslim and Jewish men in the Middle East have much in common, such as circumcision. Of course, Grievant glosses over much of the history of the Middle East, including the Six-Day War when Israel was attacked by Arab states, and only thereafter did Israel overwhelm the Arab states in a swift counter-attack.

McGrath testified that she found the clip inflammatory because it cast Jews as “one huge group of people” to whom Grievant attributed “qualities that are not positive.” She did not specify what those qualities were. In a February 13, 2023 email to Steward Leshinsky, McGrath

claimed that Grievant's statement that "People say Muslims hate Jews" is racist, even though Grievant disagreed with that statement immediately thereafter in the clip.

All in all, I find that much of the clip is somewhat amusing, but his suggestion that Israel attacked nearby Arab countries because Jews had been persecuted by Europeans could be seen as inflammatory because Israel's attack in June 1967, for example, was in retaliation for a concerted military attack by some of the Arab countries in the region.

h. We Had Slaves

I lived in a lot of *inaudible*

It's like in the Arab world, we had slaves but a lot of them were white. You can't talk about having white slaves without it sounding like a brag. Oh, these guys, yeah they're from Europe, very expensive. Uh, yeah, we had one of them speaks French. "My name is Jean Pierre," your name is Abdul. Shh.

End of standup.

Y'all, the fucking media is spreading hateful rumors about me, talking about squid destroyed my penis with their fucking beaks. False, those bigot cowards only managed to damage it severely. I gotta go back up to New York to set the record straight at the Nest in Brooklyn, Thursday September 22nd. \$10 cover charge. We got killers on there and, fucking, there's no Tom but Tom. Death to the New Jersey Civil Air Patrol.

According to McGrath, many people would find it inflammatory to hear Grievant joking about slavery, with a higher value placed on white, and especially white French speaking, slaves. At the hearing, Grievant explained the context of We Had Slaves, stating that as a member of an Arab immigrant family, he had no responsibility for the evil of slavery in the United States, but was acknowledging that Arabs had slaves, including white slaves, showing that many countries are equally wicked. He noted that a quirk of Arab slavery was that some of the slaves were whites from Europe. I find that the clip achieves its objective of showing that whites, like blacks, have been enslaved, and that the curse of American slavery is not unique among the peoples of the world. But given the very low standard for "inflammatory" (could be interpreted as inflammatory), I also find that the clip, which addresses the sensitive issue of slavery, could be interpreted by some as inflammatory.

i. Diesel Mohammed

You know black Muslims weren't getting jumped after 9/11. I love thinking about that. Imagine, like a couple of racist dudes they're like "Yo, we're going to fuck up the next Muslim we see." And who rounds the corner but fucking Diesel

Mohammad? Just a jacked black dude in a kufi. They probably look at each other, “Listen, not all Muslims are terrorists, let’s get like an Indian kid or something.”

End of stand up

Yo, I’ve just received word from Diesel Mohammad. He says you gotta buy tickets to High Minded, January 20th at Bar XIII in Wilmington, Delaware. It’s hosted by that ghoul Fenris and Otis Timlin, he’s half black and half Arab, it’s the second and third worst races there is. It’s going to be comics taking edibles and doing standup comedy but they didn’t specify which edible. I’m going to be eating pussy.

McGrath testified that she found the mere mention of 9/11 showed a lack of respect for those who died that day, and that making light of it is “easily inflammatory.” McGrath also found the comparison of races, black and Arab, (the second and third worst races) to be inflammatory because WHY Y’s values are to treat all races equally.

It strikes me that McGrath missed the point of the clip, which was that racist thugs looking to beat up Muslims after 9/11 would not think of beating up Diesel Mohammad, a black Muslim, because he was too tough. The focus was not on 9/11, but on how Muslims were treated in America after 9/11 by some people who blamed all Muslims for the attacks. But the inclination to get revenge on Muslims was tempered if the Muslim in question was a big black Muslim who was intimidating.

I find that the reference to 9/11 was a point in time which was crucial to state for the story to make sense. The clip did not make fun of the tragic event. Rather, it focused on the tendency of some Americans to blame all Muslims for the tragedy, with which Grievant obviously disagreed. He also obviously opposed the harassment and beatings of innocent Muslims after 9/11. The only part intended to be funny was when a racist thug, looking to beat up a Muslim, decided that all Muslims were not “blameworthy” – Muslims who could easily defend themselves from racist thugs were not considered terrorists.

The reference to the “race” of Otis Timlin, half Arab, half black, (the second and third worst races) was said tongue in cheek, with the race ranking from the perspective not of Grievant, but of racists. It is difficult to believe that a fair-minded person would find the clip inflammatory. But the bar is very low, and WHY Y’s 1.3 million person audience might have a few people who would find the clip inflammatory.

The Union, citing arbitral case law, claims that the social media provision of the Collective Bargaining Agreement cannot be enforced unless WHY Y can prove that it has suffered harm to its reputation or operation. I disagree. Article 4, Section 12(b) makes it clear that employees using social media “for their personal use” are subject to the provision.

Furthermore, Article 4, Section 12(e) provides that employees subject to the social media policy are subject to the Discipline and Discharge provisions of the Collective Bargaining Agreement:

(e) Employees will be guided by WHY Y’s policy on social media. A copy of the social media policy will be provided to the Union. WHY Y will give the Union no less than thirty (30) days’ notice of any changes to the policy with the opportunity to bargain over the effects of those changes. The Discipline and Discharge and Grievance and Arbitration Provisions of this Agreement shall apply in the case of any employee who is subject to discipline or discharge in connection with this provision or the social media policy.

Accordingly, I conclude that employees violating the social media provisions of the Collective Bargaining Agreement are subject to discipline and discharge in accordance with the provisions of the Collective Bargaining Agreement. Because Article 4, Section 12(b) provides that “employees must take care that their postings cannot be interpreted as inflammatory. . .,” if their social media postings can be interpreted as inflammatory, they are in violation of the provision and may be subject to discipline and discharge because “such posts may have an adverse effect on WHY Y.” Actual harm need not be proven.

The Union also claims that Scott, who Grievant knew had followed his Instagram account in November and had “liked” some of his videos posted as stories, led Grievant to believe that his video posts were in compliance with the Social Media Policy. As a result, the Union, relying on arbitral precedent, argues that discharge is too severe a penalty if his posts are ultimately found to have violated the Social Media Policy. I do not need to, and will not, address this issue because I already determined that the discharge was without just cause because upper management disregarded the requirement in the Discipline & Discharge Policy that Scott, Grievant’s manager, review and approve the summary discharge decision.

VIII. The Remedy.

The question becomes, what discipline should be imposed on Grievant short of summary discharge. Article 12, Section 4(d) suggests that the normal remedy, where WHY Y believes a post may damage its reputation, is to require that the post be removed:

(d) An employee will remove a post if required by WHY Y, if WHY Y reasonably believes that the post could create legal or reputational risks for WHY Y.

WHY Y argues strenuously that it summarily discharged Grievant because management believed that Grievant’s social media posts egregiously threatened its reputation. Curiously, WHY Y did not avail itself of the most effective way to protect its reputation: require Grievant to remove the offending posts pursuant to its contractual right to do so set forth in Article 12, Section 4(d).

Because I have found that Grievant's posting on social media of each of the nine clips could be interpreted to be inflammatory, as that term is used in Article 12, Section 4(b), I shall require him to remove all of the posts forthwith, if they remain on any of the social media platforms. Moreover, in lieu of his summary discharge, a written warning should be issued to Grievant, advising him that additional posts that breach the Social Media Policy may result in additional discipline, up to and including discharge.

Because I have concluded that WHY Y did not have just cause to summarily discharge Grievant, I shall require WHY Y to forthwith: (1) reinstate him to his former position with full seniority; and (2) make him whole.

Citing arbitral authority, WHY Y argues that Grievant's post-discharge misconduct is relevant both to the merits of the case and to whether reinstatement is appropriate. According to WHY Y, after Grievant was discharged, he posted on social media platforms certain derogatory statements about WHY Y and its outside counsel, including: (1) Sarah Glover, Vice President of Human Resources, would go to Muslim hell for lying about Grievant at the unemployment compensation hearing where WHY Y was opposing his claim for unemployment compensation; (2) Grievant referred to Italian-Americans as "Wops" and "stupid" (outside counsel and Marrazzo, CEO of WHY Y, are Italian-Americans); and (3) Grievant took the position that his Trump vs Muslims vs Jews clip could not be racist, as charged, because Jews are not a race, a mistake that Hitler made, suggesting, according to WHY Y, that Grievant was equating WHY Y management to Hitler.

I will not consider Grievant's post-discharge conduct in connection with the merits of this case because the parties stipulated at the beginning of the hearing that the issue before me is whether WHY Y had just cause to discharge Grievant. At the time of the discharge, WHY Y of course had no knowledge of post-discharge misconduct, and I will consider only evidence on which WHY Y relied at the time it made the decision to discharge Grievant.

I do not approve of Grievant's post-discharge postings, which I consider to be ill-advised, especially for someone seeking reinstatement. However, Grievant believed that WHY Y management had wrongly labeled him as a racist and misogynist, and had been wrongly and unfairly discharged. Foolishly, he stooped to engaging in name-calling, too. I find that, under all the circumstances, such "foolishness" does not disqualify him from reinstatement, but, to the extent that any of the offensive posts remain on Grievant's social media platforms, I will require him to remove them at once.

WHY Y, citing additional arbitral authority, argues that Grievant's failure to express remorse for his misconduct should disqualify him from reinstatement. I find the arbitration cases to be distinguishable because unlike in this case the arbitrators upheld the bases for the discharges. In this case, although I found technical violations of the Social Media Policy, applying the extraordinarily low bar for "inflammatory," I have not found that the violations come close to being egregious, as claimed by WHY Y. In addition, I found that WHY Y deprived

him of due process by failing to get his side of the story before discharging him, and by failing to include Scott in the decision-making process. In short, I find that WHY Y treated Grievant shabbily, which, in my view, excuses him for failing to express remorse.


IX. Summary.

In brief summary, I conclude that WHY Y did not have just cause to discharge Grievant, having rushed to judgment without first hearing Grievant's side of the story and ignoring its obligation to invite Scott to review and approve the decision to summarily terminate Grievant's employment. I also conclude that Grievant technically violated Article 4, Section 12(b) of the Collective Bargaining Agreement by posting on social media each of the nine video clips, parts of which could be interpreted as inflammatory.

X. Award

For the foregoing reasons, I conclude that: (1) WHY Y did not have just cause to discharge Grievant, Jad Sleiman; (2) WHY Y is hereby directed to forthwith: (a) reinstate Grievant to his former position with full seniority; (b) substitute a written warning for his letter of termination; and (c) make Grievant whole; and (3) to the extent that any of the nine video clips and offensive post-discharge posts remain on any of Grievant's social media platforms, he is hereby directed to forthwith cause them to be permanently removed.

December 28, 2023



Lawrence S. Coburn