

This company is a large facility and the bargaining unit consists of several hundred production and maintenance employees.

On the second shift, two production employees (of Hispanic origin) approached the production supervisor. They were visibly upset. They walked the supervisor over to a toolbox which had a sticker which said, "Speak English or get the Fuck Out."

The supervisor took a cellphone photo of it. The printout of this photo was 12 x 9 inches. He then took his fingernail and removed and crumpled the sticker, told the 2 complaining employees to go back to their work station, and called over to 2 other co-workers to identify the owner of the toolbox. These latter two employees identified it as the grievant's.

The supervisor emailed the photo, as an attachment, to HR and the department manager.

The next day, an HR representative and the department manager approached the grievant with the 12x9 photo. They told him that "via the grapevine," it was on his toolbox. To the manager, it appeared that the grievant did not know anything about it. The HR rep asked, "What do you know about this?" and the grievant lifted the cloth which would have covered it, and showed where the sticker was. To the HR Rep, it appeared that the sticker had been there for a time. It appeared to be about 6 x 4 inches.

33 to 34 percent of the facility's workforce speaks English as a second language. Sensitivity training is routinely held. The facility rule reads:

*Boisterous, disrespectful or improper language or conduct: posting improper notices; writing or otherwise defacing walls, etc. will not be tolerated and will be penalized in proportion to gravity of each particular offense or combination of offenses set for these rules.*

HR issued the grievant a level 2 warning, which lasts 10 months.

*... the presence of the sticker on your tool box could not possibly have gone unnoticed. Having said sticker on toolbox and failure to remove was misconduct.*

The grievant testified that he did not know who put the sticker on his toolbox, but it was not him. He said in a subsequent HR meeting, that he was being "set-up," but to management's dismay he would not identify who or why anyone would do so.

He is an 8-year employee with a good work record. He has an in-law who is Hispanic and another who is African-American. He testified that "he had no reason to place the alleged sticker on his toolbox" and he was disheartened by the thought, that "anybody would ever think I would do something like that."

The company argues at the hearing that the company's anti-discrimination policy requires it to take action. Two employees were upset. It [the sticker] berates a large percentage of the workforce. Based on the wear of the toolbox, it appeared to have been there for 5 months. Finally, counsel provides several citations to Supreme Court and lower court decisions holding employers liable for damages when it did not take affirmative steps to address such misconduct as present here.

As to the grievant's self-serving explanation, the arbitrator ought to give more weight to the other (and more numerous) witnesses who believe it was there by the grievant's own hand and for a long period of time. Finally, the proximity of the sticker to key hole is such that the grievant could not have seen it most days.

The union counsel argues that the company has not met its burden of proof, given that the two complaining witnesses did not testify, this is a socially-stigmatizing charge and thus a higher burden of proof than preponderance; the failure to preserve the sticker is a due process violation.